Supreme Court, U.S.
FILED
081384 MAY 7 - 2009
OFFICE OF THE CLERK

No.

# In The Supreme Court of the United States

JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER,

*Petitioners,*

v.

HOLY SEE,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the Holy See's mandate and enforcement of a policy prohibiting public disclosure of pedophilic clergy in Roman Catholic institutions caring for children in the United States sovereign conduct or private, commercial conduct under the Foreign Sovereign Immunities Act of 1976 ("FSIA")?

2. Can the federal courts decline to apply the FSIA's commercial activity exception to a foreign sovereign's private, commercial conduct and instead apply the tort exception based upon a "gravamen of the claim" test that looks to whether the "essence" of Plaintiffs' claims derives from tort law?

3. Does a requirement for application of the FSIA's tort exception that the "entire tort" must occur in the United States conflict with the express language of the tort exception, 28 U.S.C. § 1605(a)(5), which does not contain a locus requirement for tortious acts, and only requires that the "personal injury ... occur[] in the United States"?

4. Does treating the Holy See's conduct as sovereign and providing the FSIA's protections to the Holy See violate the Establishment Clause of the First Amendment to the United States Constitution, the right to a jury trial guaranteed by the Seventh Amendment and Plaintiffs' Fifth Amendment right to due process?

## PARTIES TO PROCEEDING

The Petitioners are James H. O'Bryan, Donald E. Poppe and Michael J. Turner.

The Respondent is the Holy See, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioners James H. O'Bryan, Donald E. Poppe and Michael J. Turner respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

Plaintiffs seek review of the opinion of the United States Court of Appeals for the Sixth Circuit in O'Bryan v. Holy See, 556 F.3d 361 (6th Cir. 2009), affirming O'Bryan v. Holy See, 471 F.Supp.2d 784 (W.D.Ky. 2007).

Additional opinions pertinent to the Court's review are Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009), per curiam, affirming in part and reversing in part, Doe v. Holy See, 434 F.Supp.2d 925 (D.Or. 2006).

## JURISDICTION

This Court has subject matter jurisdiction over the claims herein pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., 28 U.S.C. §§ 1331 and 1332, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, et seq., Kentucky's child abuse reporting statute, KRS

620.030, and the First, Fifth and Seventh Amendments to the United States Constitution.

## STATEMENT OF THE CASE

### I. Facts

Plaintiffs are three victims of clergy-child sexual abuse who filed a putative class action lawsuit against the Holy See for its part in causing their abuse. As alleged in Plaintiffs' Complaint, the Holy See directs, supervises, supports, promotes and engages in providing religious and pastoral guidance, education and counseling services in exchange for revenues derived from its members and other financial contributors. Pet. App. E, pp. 101-102a, ¶ 27;[1] J.A. 22. The Holy See wields broad power over the operation of the Roman Catholic Church which it used to mandate and enforce a policy of secrecy regarding sexual assaults on children in the United States by Roman Catholic clergy. The Holy See controls the conduct of its bishops and clergy and promulgates and enforces codes regarding education, training and standards of conduct and discipline for those who serve in the church. Id., pp. 102-104a, ¶ 35; J.A. 22-24. Bishops are appointed and removed by the Holy See and take an oath of office of loyalty to serve the Holy See. Id., ¶¶ 32, 34, 37; J.A. 23-24. Bishops move priests and accept them in new posts acting upon consent and authority of the Holy See. Id., ¶¶ 32, 36;

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[1] A copy of the Plaintiffs' Complaint, without attachments, is attached at Appendix E, pp. 87-137a. Plaintiffs' Complaint is supplied for the convenience of the Court because the FSIA's application is dependent upon Plaintiffs' allegations.

J.A. 23-24. The Holy See requires bishops to file regular reports of any problems with priests and clergy. Id., ¶ 34; J.A. 23. No priest, cleric, superior, bishop, archbishop or cardinal may be removed from service or a position of leadership without the approval of the Holy See or remain in service or a position of leadership over the objection of the Holy See. Id., ¶¶ 36-37; J.A. 24.

With respect to the specific conduct at issue here, the Complaint details the Holy See's imposition of a policy of secrecy regarding child sexual abuse on bishops and other clergy in the United States. The Holy See has for many decades directed its officials and employees in the United States to conceal incidents of clergy-child sexual abuse and has prohibited reporting such incidents as required by many states, including Kentucky. Id., pp. 106-108a, ¶¶ 43, 47; J.A. 27-28. The Holy See has known about the widespread problem of clergy child sexual abuse, but has covered up that abuse, including by secret settlements. Id., p. 105a, ¶ 42; J.A. 25. The Holy See allowed abusive clergy to continue to perform clerical duties and refused to permit reports of abuse to civil or criminal authorities. Id., pp. 112-113a, ¶ 62; J.A. 31-32. The Holy See harbored and protected abusive priests from public disclosure and prosecution "to maintain its aura of infallibility and thereby ensure that its parishioners, followers and financial contributors will not lose faith and fail to contribute money and property" to the Holy See. Id., p. 105a, ¶ 41; J.A. 25. The Holy See directed the movement of sexually abusive priests to areas where the conduct was not known and has never taken appropriate steps to remove sexually abusive priests from the ministry. Id., pp. 105-106a, 126a, ¶¶ 42, 99; J.A. 25-26, 43. The

Holy See provided abusive clergy the facilities and opportunity to continue their abusive conduct. Id., pp. 112a, 125a, ¶¶ 60, 97; J.A. 31, 43. The Holy See held sexually abusive clergy out to the community as fit and competent so that they could perform services (e.g., educating and counseling children) in exchange for financial support for the Holy See. Id., p. 112a, ¶ 61; J.A. 31. The Holy See requires bishops to take an oath of secrecy regarding clergy sex abuse and bishops are required by the Holy See to keep secret all files regarding clergy sex abuse and to report the information only to the Holy See. Id., pp. 103a, 106-108a, ¶¶ 34, 44-47; J.A. 23, 26-28. The Holy See also has ultimate authority to give approval or disapproval to the settlement of child sexual abuse claims. Id., p. 104a, ¶ 38; J.A. 24.

Roman Catholic clergy victimized children, including the Plaintiffs, while educating and counseling them in the Roman Catholic traditions, taking confession and overseeing their roles as altar boys and servers, all in furtherance of the purposes of the Holy See. Id., pp. 111a, 125a, ¶¶ 59, 96; J.A. 30, 31, 42-43. The Holy See's directive to conceal the sexual abuse of children committed by its clerics, agents, and employees was a substantial factor in perpetuating the abuse. Id., p. 108a, ¶ 48; J.A. 28. Plaintiffs were sexually abused while under the care, custody, authority, control and influence of Roman Catholic priests whose authority was granted to them by the Holy See. Id., pp. 113a, 126a, ¶¶ 63-64, 100; J.A. 32, 44. The sexual molestation of Plaintiffs was committed while the abuser was executing the duties he was assigned to perform for the Holy See. Id., pp. 113a, 126a, ¶¶ 65, 101; J.A. 32, 44. At all times

United States bishops acted within the scope of authority granted to them by the Holy See:

> The absolute power of the Defendant, Holy See, over its bishops in the United States was demonstrated in 2002, when the U.S. Conference of Catholic Bishops adopted a proposed policy designed to protect children from priest sexual abuse. The bishops were powerless to implement this policy without approval from the Defendant, Holy See. The Defendant, Holy See, denied approval of key provisions sought by the U.S. bishops which would have required that its agents in the United States report all known or suspected child abuse to the civil authorities. The Defendant, Holy See, also refused to give the U.S. bishops the power to remove abusive priests from the ministry.

Id., pp. 105-106a, ¶ 42; J.A. 25-26.

The Holy See's longstanding policies and directives for dealing with clergy child sex abuse are detailed in a March, 1962 document entitled, "From the Supreme and Holy Congregation of the Holy Office for All Patriarchs, Archbishops, Bishops and Other Diocesan Ordinaries 'Even of the Oriental Rite' Instruction on the Manner of Proceeding in Cases of Solicitation, The Vatican Press, 1962." Id., p. 107a, ¶ 45; J.A. 26-27. The 1962 mandate is described in the Complaint:

> In March, 1962, the Defendant, Holy See, privately circulated a document containing a set of procedural norms for dealing with the solicitation of sex in confession, clergy sex with

> minors, homosexual relations, and bestiality. . . . This document is a reflection and written manifestation of the longstanding policies and directives of the Holy See regarding clergy sexual abuse, and imposed the extreme level of secrecy not only on those who handled such cases but also on the document itself. . . . The policy of the Defendant, Holy See, expressed in this and other documents, requires bishops in the United States, including the Commonwealth of Kentucky, to refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even though such failure is a criminal offense in most of the United States, including the Commonwealth of Kentucky.

Id., p. 107a, ¶ 45; J.A. 26-27.

Under TITLE V, the 1962 mandate identifies "The Worst Crime," which includes any "obscene external deed gravely sinful, in any way perpetrated by a cleric or attempt with a person of his own sex" and "any obscene, external act, gravely sinful, perpetrated in any way by a cleric or attempted by him with youths of either sex or with brute animals (bestiality)." Pet. App. F, p. 154a; J.A. 386-387.[2] The mandate dictates, in flagrant disregard for state reporting statutes: "if . . . there are indications of a crime serious enough but not yet sufficient to institute an accusatorial process, as especially in the case where only one or two

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[2] The pages of the 1962 mandate quoted hereinabove with the quoted material highlighted, are attached at Appendix F, pp. 138-157a.

denunciations are had, ... the accused [is] admonished [which] . . . is always to be given secretly. Id., pp. 150-151a; J.A. 380-81. Further:

> [W]hat is treated in these cases has to have a greater degree of care and observance so that these same matters be pursued in a most secretive way, and, after they have been defined and given over to execution, they are to be restrained by a perpetual silence (Instruction of the Holy Office, February 20, 1867, n. 14), each and everyone pertaining to the tribunal in any way or admitted to knowledge of the matters because of their office is to observe the strictest secret, which is commonly regarded as a secret of the Holy Office, in all matters and with all persons, under the penalty of excommunication *latae sententiae, ipso facto* and without any declaration [of such a penalty] having been incurred and reserved to the sole person of the Supreme Pontiff, even to the exclusion of the Sacred Penitentiary, are bound to observe [this secrecy] inviolably.

Id., p. 141a; J.A. 374. See also Pet. App. E, pp. 106-107a, ¶¶ 44-45; J.A. 26-27 (instances of clergy sex abuse are to be deemed a "pontifical secret," a grade of confidentiality just short of sacramental confession).

An oath of secrecy was required not just of those investigating the allegations, but also of the victim, his family and witnesses: "[B]efore he [victim] is dismissed, there should be presented to him, as above, an oath of observing the secret, threatening him, if there is a need, with an excommunication reserved to the Ordinary [i.e., bishop] or to the Holy See." Pet.

App. F, p. 143-148a; J.A. 375-76, 379. The 1962 mandate was approved by the Pope, who ordered that it be observed "in the minutest detail." Id., p. 155a; J.A. 387.

Pursuant to the Holy See's policy of secrecy, which has been in existence in writing since 1922, and was updated in 1962, known and suspected incidents of child sexual abuse were concealed and not reported to the appropriate authorities and pedophiles were permitted to interact with children placed in the care of Roman Catholic institutions without warning parishioners of their criminal proclivities. Pet. App. E, pp. 94-95a, 117-122a, ¶¶ 4, 75-89; J.A. 16-17, 36-40. Multiple "denunciations" were required before the alleged "crime" was deemed "serious," and even then only a secret reprimand would be issued. Pet. App. F, p. 153a; J.A. 386. Kentucky law, however, requires every person "who knows or has reasonable cause to believe" that a child is abused to report the abuse to state authorities. KRS 620.030(1). The 1962 mandate plainly required Holy See officials, agents and employees to violate this law.

The Holy See is "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Hunt v. McNair, 413 U.S. 734, 743 (1973). It is "the composite of the authority . . . vested in the Pope and his advisers to direct the worldwide Roman Catholic Church." J.A. 157; Pet. App. E, p. 100a, ¶ 19; J.A. 21. The Holy See as supreme authority over the Roman Catholic Church was formed centuries before the State of the Vatican City became an independent state. J.A. 156-57. The independent Vatican City was formed by the grant of the City of the Vatican to the Holy See pursuant to the

Lateran Pacts of 1929 (Lateran Treaty). The Lateran Treaty resolved the dispute, termed the "Roman Question," over the Holy See's demand to be the supreme authority over the Roman Catholic Church, not answerable to Italian rule. The opening paragraph of the Lateran Treaty recognizes the purpose of the City of the Vatican to "guarantee absolute independence for the fulfillment of [the Holy See's] exalted mission in the world." C. G. Fenwick, "The New City of the Vatican," 23 Am. J. Int'l L. 371 (1929); Lateran Agreement, Feb. 11, 1929, Italy-Vatican City, 0 V.T.S. 161, Europ.T.S. No. 590019.

Very little is involved in overseeing the Vatican City. "The Pope delegates the internal administration of the Vatican City to the Pontifical Commission for the State of the Vatican City." J.A. 157. At present, the City of the Vatican has a population of 824 individuals. It has no army (although it has a ceremonial guard), no trade, no gross national product and no debt. Its infrastructure, including necessary utilities, is supported almost exclusively by Italy. Its identity as a foreign state is *de minimis* in comparison to its identity as the world leader of the Roman Catholic Church. However, as the State of the Vatican City, the Holy See enjoys diplomatic relations with the United States. The fact that "the Vatican City and the Holy See are closely related but not interchangeable entities" was noted by the Ninth Circuit in Alperin v. Vatican Bank, 410 F.3d 532, 540 n. 2 (9th Cir. 2005), cert. denied, 126 S.Ct. 1141 (2006) and 126 S.Ct. 1160 (2006).

II. Procedural History and Disposition Below

Due to its unique dual nature, the Plaintiffs sued the Holy See in its distinct capacities as a foreign state and as the unincorporated head of an international religious organization. In lieu of answering the Complaint, the Holy See filed motions to dismiss for insufficient service of process and for lack of subject matter jurisdiction. Ruling first on the sufficiency of service, the district court for the Western District of Kentucky determined that the Holy See's status as a foreign state is "nonjusticiable" and that Plaintiffs would be required to follow the requirements of the FSIA to accomplish service. Pet. App. C, pp. 73-74a; J.A. 196. Subsequently ruling on the Holy See's motion to dismiss for lack of jurisdiction, the district court concluded that because the Holy See is a foreign state recognized by the United States, the court's jurisdiction over the Holy See is confined to the FSIA. Pet. App. B, pp. 47-48a; J.A. 81. The district court then analyzed the exceptions to immunity under the FSIA and determined that jurisdiction over the Holy See could be established under the tort exception, 28 U.S.C. 1605(a)(5).

The district court declined to find jurisdiction under the commercial activity exception, relying heavily on a parallel case, Doe v. Holy See, 434 F.Supp.2d 925 (D.Or. 2006), affirmed in part, reversed in part, Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009)(per curiam). Like the present case, Doe involves claims that the Holy See's mandated silence regarding clergy-child sex abuse resulted in the childhood sexual abuse of the plaintiff.

The Oregon district court in Doe initially acknowledged that under the FSIA and this Court's precedent in Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992), the court was required to determine whether the Holy See's actions were public, sovereign acts, or whether they were private, commercial acts. Doe, 434 F.Supp.2d at 940. But the Oregon court struggled with applying this analysis to "religious activities," noting, "While this method of analysis can be helpful in analyzing the activities of Sweden or Cuba or Argentina, or even the more squarely commercial activities of the Holy See (such as leasing equipment or buying supplies), it is less helpful in analyzing the Holy See's more intrinsically religious activities." Doe, 434 F.Supp.2d at 941.

When the Doe court did analyze the Holy See's conduct divorced from religious context, the court found that the Holy See's actions were clearly "not the kinds of activities in which only government actors may engage" and that the Holy See's conduct was commercial, not sovereign. Id. For example, the Oregon court found that the Holy See's provision of guidance, education and counseling services are the types of services private actors can be expected to provide and are not the kinds of activities in which only government actors may engage. Id. Likewise, the court found that the Holy See's actions in furtherance of obtaining financial support in the marketplace qualify as commercial activities. Id.

Ultimately, however, the Oregon court concluded it could not ignore the "intrinsically religious" nature of the Holy See's actions, which it found to be in conflict with the determination that the Holy See had engaged in private, commercial conduct. Despite concluding

that the Holy See's "numerous activities" were "squarely commercial," the Doe court held that the Holy See's "core religious duties" are "widely viewed as the antithesis of commerciality" and thus the Holy See could not be deemed to have performed commercial acts. Id. at 941-42. The court then abandoned the private versus public analysis of Weltover and, instead, focused on the plaintiff's injury and what it deemed to be the "true essence of the complaint." Id. at 942. Employing this approach, the Doe court concluded that "at the heart of plaintiff's complaint is the injury inflicted by a sexually abusive priest at plaintiff's church, a claim clearly sounding in tort," and that because plaintiff offered no claim such as "property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial," the commercial activity exception would not apply. Id.

Adopting the Doe reasoning, the Kentucky district court also sidestepped the public versus private inquiry. Generally endorsing Doe, the Kentucky court did not set forth an independent examination of whether the Holy See's conduct was sovereign or commercial. Instead, the Kentucky court concluded, like Doe, that the "'true essence'" of the Plaintiffs' claims "clearly sound[ed] in tort" and thus were "not commercial." O'Bryan, 471 F.Supp.2d at 788 (quoting Doe, 434 F.Supp.2d at 942 and citing Saudi Arabia v. Nelson, 507 U.S. 349, 363, (1993)). As discussed further herein, the district courts' "true essence" approach (adopted and employed by the Sixth Circuit as a "gravamen of the claim" test) is in conflict with this Court's precedent and the plain language and purpose of the FSIA.

After dispensing with the commercial activity exception, the Kentucky district court found that the tort exception did apply to establish jurisdiction over some, but not all, of Plaintiffs' claims. O'Bryan, 471 F.Supp. at 791-792. The district court declined to find jurisdiction over the Holy See's tortious acts and omissions that occurred abroad even if they caused injury in the United States, adopting a rule that "both the injury and the tortious act or omission must occur in the United States." O'Bryan, 471 F.Supp.2d at 790. In so holding, the district court acknowledged that the tort exception does not contain an explicit territorial limitation on tortious conduct (as opposed to injury) and that this Court's position regarding the application of the tort exception to conduct abroad is unclear. Id. at 789 (citing Argentine Republic v. Amerada Hess Shipping Corporation, 488 U.S. 428, 441 (1989)).

The district court also dismissed Plaintiffs' claim of negligent failure to provide safe care and custody, which the district court deemed to be essentially a negligent hiring claim, as falling within the exception to the tort exception for discretionary acts, 28 U.S.C. 1605(a)(5)(A). O'Bryan, 471 F.Supp.2d at 793. Since claims for deceit and misrepresentation are also not available under the tortious activity exception, 28 U.S.C. 1605(a)(5)(B), the district court dismissed those claims. Id. at 795. Concluding its analysis, the only claims against the Holy See over which the district court found jurisdiction were those arising from the conduct of the Holy See's employees and officials in the United States for their "negligent failure to report, negligent failure to warn, breach of fiduciary duty (insofar as that breach involved the failure to report and the failure to warn), outrage and emotional

distress [and] violations of the customary law of human rights." Id. at 795.

The Sixth Circuit affirmed the result reached by the district court, but its analysis differed in key respects. Most significantly, the Sixth Circuit did not sidestep the issue of whether or not the Holy See's conduct was public or private. It endorsed two distinct tests limiting the application of the commercial exception:

> The analysis in Weltover and Nelson points to two distinct limitations on the application of the commercial activity exception. First, the activity must be of the type in which private individuals engage; if the activities in question are not private, but sovereign in nature, then the commercial activity exception will not apply. This flows from the purpose of the commercial activity exception-to encapsulate the restrictive theory of sovereign immunity, which grants immunity for the public, not private, actions of a sovereign....
>
> Second, the Weltover and Nelson cases also instruct courts to avoid the artful pleading of plaintiffs and look to the core of the activities alleged to be commercial in nature... "to ascertain the claim's gravamen to determine whether the FSIA plaintiff is simply using creative nomenclature as a semantic ploy to shroud the true essence of its theory and obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah, 184 F.Supp.2d 277,

> 299 (S.D.N.Y.2001) (internal quotation marks and citation omitted). District courts have applied both limiting principles in instructive contexts.

O'Bryan, 556 F.3d at 379-380.

As to the second "limiting principle," the Sixth Circuit, like the district court below, adopted the analysis of the Oregon district court in Doe, and concluded that because "the gravaman [sic] of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees," the commercial activity exception does not apply. O'Bryan, at 380. The problems with this "gravamen" or "essence" of the claim rule are discussed below.

Unlike the Kentucky and Oregon district courts, the Sixth Circuit also applied the private versus public analysis, and held that jurisdiction over the Holy See could not be based upon the commercial activity exception because the Holy See's conduct at issue was public (i.e., sovereign) conduct. With respect to this "limiting principle," the Sixth Circuit found that because "all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See" and because of "the force of the purported policy and the potential for sanction if Holy See employees chose not to comply" the commercial exception would not apply.[3] Id. Thus, under the Sixth

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[3] Although the Sixth Circuit focused on the 1962 mandate, in fact, the Holy See's policies and procedures enforcing silence regarding clergy-child sex abuse existed long before and were simply

Circuit's analysis, the Holy See's conduct that led to the sexual abuse of children by priests in U.S. churches and schools is to be regarded as "'a sovereign function, incapable of being performed by a private individual.'" Id. at 379 (quoting City School of Detroit v. Government of France, 1990 U.S. Dist. LEXIS 19577, at 9-10 (E.D.Mich.1990)). As discussed further below, this result is intolerable under this Court's precedent, the purpose of the FSIA and the United States Constitution.

Turning to the tort exception, the Sixth Circuit, like the district court, adopted a rule that the "entire tort" must occur in the United States. O'Bryan, 556 F.3d at 382. Therefore, the court concluded, "any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive." Id. at 385. However, "plaintiffs' claims ... premised on the conduct of Holy See employees in the United States engaged in the supervision of the allegedly abusive priests" met the tortious act exception. Id. at 386. The court then analyzed whether any claim fell within the exceptions to the tort exception for discretionary acts and misrepresentation and deceit. Again adopting the reasoning of the district court, the Sixth Circuit deemed Plaintiffs' claim for the failure to provide safe care the equivalent of a claim for negligent hiring and dismissed this claim as falling within the discretionary function exception. Id. at 387. Concurring with the district court's conclusion, the Sixth Circuit found jurisdiction under the tort exception over Plaintiffs'

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reissued in 1962. See Pet. App. E, p. 107a, ¶ 45, J.A. 26-27 (1962 document is "a reflection and written manifestation of the longstanding policies and directives.")

claims against the Holy See for the acts of its employees and officials in the United States for violations of customary international laws of human rights, infliction of emotional distress, negligent failure to warn and report, negligent supervision and breach of fiduciary duties. Id. at 388.

## REASONS FOR GRANTING THE PETITION

### I. THE SIXTH CIRCUIT'S HOLDING THAT THE CONCEALMENT OF CLERGY-CHILD SEX ABUSE IN ROMAN CATHOLIC INSTITUTIONS IS SOVEREIGN CONDUCT NOT GOVERNED BY THE COMMERCIAL ACTIVITY EXCEPTION FINDS NO SUPPORT IN THE STATUTE, CONGRESSIONAL INTENT OR THIS COURT'S PRECEDENT

As noted above, departing from the district court's opinion, the Sixth Circuit concluded that the Holy See's "promulgation" of the policy of secrecy and the "potential for sanction if Holy See employees chose not to comply" were public acts. O'Bryan, 556 F.3d at 380. The Sixth Circuit did not elaborate upon this conclusion but its reliance on the Oregon district court's analysis in Doe is instructive. When the Oregon court analyzed the Holy See's conduct without regard for its religious purpose, it unerringly found that the conduct was the type of commercial conduct engaged in by private individuals, and not uniquely sovereign. However, the Oregon court could not reconcile "commerciality" with religion and thus ultimately concluded that the Holy See's conduct was not commercial. Plaintiffs agree that the private versus public analysis announced by this Court in

Weltover applies here, and, indeed, submit that the district court's decision to sidestep the inquiry is not permitted under the FSIA and this Court's precedent. However, the Sixth Circuit's conclusion that the Holy See's conduct is sovereign is clearly erroneous. Exempting the Holy See's conduct from the commercial activity exception due to its "intrinsically religious" nature is not authorized by the express language or purpose of the FSIA, this Court's decision in Weltover, and as discussed below, the United States Constitution.

The FSIA does not immunize the Holy See for its commercial activities. 28 U.S.C. §1605(a)(2). The purpose of the commercial activity exception is "to prevent foreign states from taking refuge behind their sovereignty when they act as market participants." Nelson, 507 U.S. at 368 (White, J., concurring). Congress intentionally left FSIA's definition of commercial activity[4] vague to give the federal courts "a great deal of latitude in determining what is a 'commercial activity.'" H.R. REP. NO. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615 (hereinafter, "House Report"); J.A. 252-275.

In Weltover, supra, this Court articulated the private versus public inquiry to determine what constitutes commercial activity under the FSIA:

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[4] The FSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 504 U.S. at 614 (citations omitted) (emphasis in original).

There is no exemption under the commercial activity exception for religious conduct. Indeed, the Holy See's purpose to spread the Roman Catholic faith must be disregarded. 28 U.S.C. § 1603(d). "However difficult it may be in some cases to separate 'purpose' (i.e., the reason why the foreign state engages in the activity) from 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform) [citation omitted] the statute unmistakably commands that to be done." Weltover at 617. The fact that payment for the Holy See's services was made in the form of contributions does not detract from their commercial nature. Id. at 616.

Viewed as the statute requires without reference to purpose, the Holy See's activities including offering

education, church services and religious guidance, endorsing priests as fit to oversee religious education and church activities for children, requiring bishops to file regular reports outlining problems with priests and clergy, keeping secret files on abusive priests, etc., are all private, commercial activities.

The establishment and enforcement of policies governing the conduct of priests is commercial conduct because those clerics were engaging in commercial activity for the Holy See. "Activities such as a foreign government's ... employment or engagement of laborers, clerical staff or public relations or marketing agents" are examples of commercial activity Congress contemplated. House Report at 6615. The reasoning of Judge Berzon, dissenting in part in Doe v. Holy See, 557 F.3d at 1091, is instructive here:

> [T]he Holy See has both "ecclesiastical" and "governmental" functions. In its governmental role, the Holy See undertakes certain functions that are undoubtedly sovereign. It maintains a volunteer military to defend the territory of Vatican City, over which it has complete control; it may enact laws with domestic effect and enter into international treaties and compacts with other nations; and it sends and receives diplomatic representatives to and from other states.... Had Ronan [plaintiff's abuser] been employed to perform any of these "diplomatic, civil service, or military" functions, his employment by the Vatican would have fallen outside the FSIA's commercial activity exception. But, on the allegations in the complaint, Ronan was not a civil service, diplomatic, or military employee-the types of

> employees that only sovereign states can employ. Nor is there any evidence that Ronan was "privy to any governmental policy deliberations" or that he engaged in "legislative work" on behalf of the Holy See.... Rather, the Holy See hired Ronan to perform ecclesiastical and parochial services-to provide "religious and pastoral guidance, education and counseling services" to the Church's faithful. Providing religious, educational, and counseling services is not a peculiarly governmental function; it is something that non-governmental employers can do.

(Footnote and internal citations omitted).

Under the Sixth Circuit's analysis, the conclusion that the Holy See's conduct was not subject to the commercial activity exception ignores the private, non-sovereign nature of the conduct and restores immunity to the Holy See for, inter alia, its direct role in placing abusive priests in positions of power over children. Nothing indicates that Congress intended the FSIA to immunize religious conduct as sovereign.

## II. THE "GRAVAMEN OF THE CLAIM" TEST ADOPTED BY THE SIXTH CIRCUIT AND A GROWING NUMBER OF COURTS WHICH ELIMINATES JURISDICTION UNDER THE COMMERCIAL ACTIVITY EXCEPTION FOR CLAIMS "SOUNDING IN TORT" CONFLICTS WITH THE EXPRESS LANGUAGE OF THE FSIA, ITS PURPOSE AND THIS COURT'S PRECEDENT

The FSIA's plain language does not permit a rule that claims for injuries arising from commercial conduct may be analyzed under the tort exception because they are "in essence" tort claims. Once it is determined that the foreign sovereign's activity is the type of conduct engaged in by private entities (i.e., commercial activity), the express language of the FSIA prevents the court from proceeding to the tort exception. The preface to the tort exception limits its application to claims "not otherwise encompassed" by the commercial activity exception. 28 U.S.C. § 1605(a)(5). As stated by the court in Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1219 (10th Cir. 1999):

> The plain language of § 1605(a)(5) indicates that the tort exception applies to tort actions for money damages "not otherwise encompassed" by § 1605(a)(2)'s exception relating to commercial activity. Even assuming Plaintiffs' claims against Defendants sound in tort rather than contract, those claims nonetheless are based upon alleged commercial activity, and thus encompassed by § 1605(a)(2).

See also Export Group v. Reef Industries, Inc., 54 F.3d 1466, 1473 (9th Cir. 1995) ("by its plain and unambiguous terms, section 1605(a)(5) limits the reach of those restrictions only to noncommercial torts"); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1544 fn. 13 (11th Cir. 1993) ("The fact that [plaintiff] seeks to recover for personal injuries does not belie the commercial nature of [defendant's] activity and thus does not require us to analyze this case under the 'noncommercial torts' exception to foreign sovereign immunity"); Letelier v. Republic of Chile, 748 F.2d 790, 795 (2nd Cir. 1984) cert. denied, 471 U.S. 1125 (1985) ("the commercial activity exception to jurisdictional immunity under (2) and the tort exception under (5) are mutually exclusive"). But see Doe v. Holy See, 557 F.3d at 1075, n.3 ("This language does not mean that, in interpreting the tortious act exception in (a)(5), we must always first consider whether the commercial activity exception in (a)(2) applies.")

The commercial activity exception, by contrast, is not limited by its language or purpose from applying to tort claims. Courts routinely apply the commercial activity exception, not the tort exception, to find jurisdiction over foreign sovereigns for wrongful death and personal injury claims "sounding in tort." In Vermeulen, supra, jurisdiction under the commercial activity exception was appropriate over claims for personal injuries caused by a defectively designed automobile. In Filus v. Lot Polish Airlines, 907 F.2d 1328, 1333 (2nd Cir. 1990), jurisdiction under the commercial activities exception was appropriate over a wrongful death negligence claim arising out of an airplane crash. See also Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309, 1311 (9th Cir. 1994) (same); Barkanic v. General Admin. of Civil Aviation

of the People's Republic of China, 822 F.2d 11, 14 (2nd Cir. 1987), cert. denied, 484 U.S. 964 (1987) (same). In Sun v. Taiwan, 201 F.3d 1105, 1108 (9th Cir. 2000), the commercial activities exception applied to a claim for the wrongful drowning death of a participant in a Taiwan-sponsored cultural trip. And in Aldy v. Valmet Paper Machinery, 74 F.3d 72 (5th Cir. 1996) cert. denied, 519 U.S. 817 (9th Cir. 1994), jurisdiction under the commercial activities exception existed over a wrongful death caused by a negligently designed paper machine.

Despite the plain language of the preface to the tort exception, the Sixth Circuit adopted a rule that applies the tort exception to commercial activity if the "gravamen of the claim" sounds in tort. This test was also employed by the Oregon district court in Doe, supra, and the Kentucky district court below. The court in Leutwyler, 184 F.Supp.2d at 299, cited by Sixth Circuit, adopted the same approach.

The lower courts' "gravamen of the claim" test derives from language used by this Court in Nelson, 507 U.S. at 363, in which it was held that a victim of police brutality by the Saudi government could not recast his claim as commercial. Nelson claimed his injury arose from the Saudi Government's failure to warn him of the danger when it recruited him to work at a government hospital. This Court found that Nelson's claims were based upon "the Saudi Government's wrongful arrest, imprisonment, and torture," not the circumstances of employment. Nelson, 507 U.S. at 361. The Saudi government's intentional wrongs "could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi

Government ... a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." Id. Further, the "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce." Id. at 362. Thus, Nelson could not recast his "claim of intentional tort *committed by sovereign act* as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it." Id. at 363 (emphasis added).

Nelson teaches the importance of examining the conduct of the foreign sovereign, and not the plaintiff's claims to discern the nature of the activity at issue. Nelson does not support the Sixth Circuit's "broader" approach to first "ascertain the claim's gravamen," and apply the tort exception to claims "sounding in tort." O'Bryan, 556 F.3d at 379-380. In fact, the Sixth Circuit's "gravamen of the claim" rule directly conflicts with this Court's holding in Nelson by allowing the claim to trump the nature of the sovereign's conduct. Furthermore, the "gravamen of the claim" rule promotes an interpretation of the FSIA inconsistent with Congress' intent to codify the restrictive theory of foreign sovereign immunity which does not immunize a foreign sovereign engaging in commercial conduct. Weltover, 504 U.S. at 612. Under the restrictive theory, immunity should be granted "only with respect to causes of action arising out of a foreign state's public or governmental actions." Alfred Dunhill v. Republic of Cuba, 425 U.S. 682, 698 (1976). The Sixth Circuit's "gravamen" rule violates the restrictive theory by reestablishing immunity for torts arising from commercial and private activities.

Plaintiffs here have not recast their claims as commercial using a "semantic ploy." O'Bryan, 556 F.3d at 380. Unlike the Saudi government agents in Nelson, the priests that abused the Plaintiffs were not acting at the direction of the Holy See exercising its "police powers." Plaintiffs were victimized by priests "doing the kinds of acts they were engaged to perform, including educating and/or counseling minor children in the Roman Catholic traditions, taking confession, and overseeing their roles as altar boys and servers." Pet. App. E, p. 111a, ¶ 59; J.A. 30-31. The Holy See's provision of counseling and religious education and the creation of rules of employment and standards of conduct at institutions that accept children into their care are by no means peculiarly sovereign. Nor are the Holy See's actions to keep child sexual abuse secret an exercise of police power.

The plain language of the FSIA, its purpose as codifying the restrictive theory of foreign sovereign immunity, and this Court's precedent deny the federal courts discretion to refuse to apply the commercial activities exception to tort claims such as those here based upon a "gravamen of the claim" rule. Such a result would restore immunity to the Holy See for commercial conduct Congress did not intend to protect.

## III. A CONFLICT EXISTS AMONG THE CIRCUITS REGARDING WHETHER THE LANGUAGE OF THE FSIA AND THIS COURT'S DECISION IN AMERADA HESS REQUIRE THAT THE "ENTIRE TORT" OCCUR IN THE UNITED STATES FOR THE FSIA'S TORT EXCEPTION TO APPLY

Assuming jurisdiction over the Holy See exists only under the FSIA's tort exception, this Court should rule upon whether the tort exception requires the "entire tort" to occur in the United States, or whether foreign sovereigns can be held accountable for their conduct abroad if it causes injury in the United States. The express language of the tort exception does not contain a requirement that the entire tort occur in the United States. Instead, it requires only that "personal injury or death, or damage to or loss of property, occur[] in the United States." 28 U.S.C. § 1605(a)(5). By comparison, the commercial activity exception does place limitations on when commercial acts abroad give rise to jurisdiction. 28 U.S.C. § 1605(2). If Congress had intended to limit the tort exception to acts in the United States, it could have so provided.

Despite the express language of the tort exception that requires only that an injury occur in the United States, the Sixth Circuit held that both the injury and the tortious conduct must occur in the United States. Pursuant to this "entire tort" rule, the Sixth Circuit dismissed all of Plaintiffs' claims against the Holy See arising from its direct actions, which presumably occurred abroad. O'Bryan, 556 F.3d at 385 ("the tortious act exception to the FSIA's grant of immunity would not include any theory of liability premised on the Holy See's own negligent supervision because such

acts presumably occurred abroad; moreover, a direct claim leveled against the Holy See for promulgating the 1962 Policy would not fall within the tortious act exception because it too presumably occurred abroad"). As a result of the Sixth Circuit's refusal to find jurisdiction over the Holy See for its direct acts, those class members who have released local officials may face defenses that would not be available to the Holy See for its direct acts. Thus, the application of the "entire tort" rule may have far reaching consequences for victims of the Holy See's mandated silence regarding abusive clergy.

The Sixth Circuit cited this Court's decision in Amerada Hess, 488 U.S. at 441, as an endorsement of the "entire tort" requirement. Amerada Hess dealt with an injury that occurred outside of the United States. A Liberian oil tanker was bombed by the Argentine Republic, which was at war with Britain over the Falkland Islands. Per the Court, "the *injury* to respondents' ship occurred on the high seas some 5,000 miles off the nearest shores of the United States. . . Because respondents' *injury* unquestionably occurred well outside the 3-mile limit then in effect for the territorial waters of the United States, the exception for noncommercial torts cannot apply." Id., 488 U.S. at 440-41 (emphasis added).

The Court discussed the fact that while the sinking of the ship might have had "effects in the United States," this was insufficient to invoke federal jurisdiction under the tort exception. Id. at 441. In dicta, the Court stated, "Congress' decision to use explicit [direct effects] language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring

within the territorial jurisdiction of the United States." Id. Because the Court in Amerada Hess never considered whether tortious conduct outside the United States that causes injury in the United States is actionable, the use of the word, "torts" rather than "injuries", must be regarded as dicta.

As the Kentucky district court noted below, this Court's language in Amerada Hess is "not completely clear." O'Bryan, 471 F.Supp.2d at 789. However, the dicta above was deemed to endorse a test that the "entire tort" must occur in the United States. Id.; O'Bryan, 556 F.3d at 382. See also Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524 (D.C. Cir. 1984) cert. denied, 470 U.S. 1051 (1985); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379-380 (7th Cir. 1985).

The case of Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980), provides a good example of why conduct by a foreign sovereign outside the United States that causes injury in the United States should give rise to jurisdiction under the tort exception. Letelier involved an assassination in the District of Columbia. The court found jurisdiction over the Republic of Chile under the FSIA's tort exception. Rejecting Chile's argument that the "act of state" doctrine prohibits the court from asserting jurisdiction over acts done within the foreign sovereign's own territory, the district court pointed out:

> Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within that country, that circumstance alone will not allow it to absolve itself under the

> act of state doctrine if the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act "through the back door, under the guise of the act of state doctrine."

Letelier, 488 F.Supp. at 674 (quoting House Report, at 6619; other citations and internal quotations omitted).

The California court in Olsen by Sheldon v. Government of Mexico, 729 F.2d 641 (C.A.Cal. 1984), voiced similar concerns when it rejected a requirement that all of the defendant's tortious acts occur in the United States:

> [R]equiring every aspect of the tortious conduct to occur in the United States... would encourage foreign states to allege that some tortious conduct occurred outside the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery. Such a result contradicts the purpose of the FSIA, which is to "serve the interests of justice and ... protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602. The FSIA requires us to protect the rights of plaintiffs while respecting the sovereignty of foreign states.

Olsen, 729 F.2d at 646 (footnote and citation omitted).

The "entire tort" requirement applied by the Sixth Circuit in this case suffers from the same faults identified by the courts in Letelier and Olsen. By virtue of this rule, the Holy See escapes liability for its own conduct simply because its order to conceal clergy-child sexual abuse originated at the Vatican even though it was directed to the United States. Likewise, it is relieved of liability for its negligent supervision even though the Holy See required bishops to report problems involving abusive clergy directly to the Vatican in secret and controlled decisions regarding priest discipline.

## IV. TREATING THE HOLY SEE'S CONDUCT AS SOVEREIGN IS UNCONSTITUTIONAL

### A. The Sixth Circuit's Application of the Tort Exception Rather Than the Commercial Activity Exception to the Holy See Violates the Establishment Clause

The Establishment Clause commands that government "shall make no law respecting an establishment of religion" and imposes direct restrictions upon special favors granted to any one religion. U.S. Const. Amend. I. Everson v. Board of Education of Ewing, 330 U.S. 1, 15-16 (1947). At the heart of the Establishment Clause is the principle that governments should pursue a course of neutrality which favors neither one religion over another, nor favors religion generally to non-religion. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 696 (1994).

Although the FSIA is neutral on its face, the governmental decisions that brought the Holy See

within its ambit are not. "[A] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right." Boddie v. Connecticut, 401 U.S. 371 (1971). See also Bowen v. Kendrick, 487 U.S. 589, 609-610 (1988) ("when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion"). "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Hunt v. McNair, 413 U.S. at 743. The Holy See is "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Id.

When one religion is favored over others, the Court must regard the action with strict scrutiny and invalidate it unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest. Larson v. Valente, 456 U.S. 228, 246 (1982). Strict scrutiny applies to the Sixth Circuit's application of the FSIA in this case. When the Sixth Circuit declared the Holy See's religious activities to be sovereign activities, it exempted the Holy See's religious activities from the application of the commercial activity exception. When it further applied the exceptions to the tort exception to reestablish immunity for some of Plaintiffs' claims, it declared some of the Holy See's religious conduct to be sovereign activity entitled to complete immunity from suit. Had the court applied the commercial activity exception, Plaintiffs would have the benefit of the full

array of their legal claims against the Holy See, just as any other commercial actor.

No rational basis was offered by the Sixth Circuit for treating the Holy See's religious conduct as sovereign rather than commercial. O'Bryan, 556 F.3d at 380. It did not find the Holy See's conduct to be uniquely sovereign. Rather, the Sixth Circuit appears to have adopted the opinion in Doe, 434 F.Supp.2d at 941-42, that commercial activities that are "intrinsically religious" cannot be deemed private, commercial conduct under the FSIA.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson at 244. Government sponsored favoritism is "not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." Wallace v. Jaffree, 472 U.S. 38, 60 (1985). Recognizing the Holy See as a foreign sovereign and treating the Holy See's religious activities as sovereign rather than commercial is an active governmental protection of the Holy See, not a passive tolerance of religion. Declaring the Holy See's conduct sovereign activity is a clear endorsement of the supreme authority of the Holy See over Roman Catholic institutions in the United States, superior to the rights of individual citizens. No other church has such supreme authority in the operation of its religious institutions in the United States.

B. Application of the FSIA's Protections to the Holy See Is Unconstitutional

Plaintiffs additionally challenge the applicability of other FSIA protections to the Holy See in its capacity as the Head of the Roman Catholic Church. The constitutionality of applying the FSIA to the head of a religious organization presents a purely legal issue ripe for this Court's review. Like the "religious gerrymandering" at issue in cases such as Larson and Kiryas Joel, supra, application of the FSIA's protections to the Holy See has both the purpose and effect of favoring the Roman Catholic Church. Granting such substantial benefits to a religious organization violates the Establishment Clause, and unconstitutionally deprives Plaintiffs of their right to due process under the Fifth Amendment and a jury trial under the Seventh Amendment. As such, absent a compelling government interest narrowly tailored to suit its purpose, it will not pass this Court's constitutional review.

Foreign sovereign immunity is entirely founded on principles of comity. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004). The concept of comity does not mandate disregard for the rights of citizens of the United States and those under the protection of its states' laws. Hilton v. Guyot, 159 U.S. 113, 163-165 (1895).

Refusing to extend special protection in the form of immunity to the Holy See is of the greatest importance here, where the issue is neutral application of laws intended to prevent sexual abuse of children of every faith. It has long been held that "the professed

doctrines of religious beliefs" are not "superior to the law of the land." Reynolds v. United States, 98 U.S. 145, 164, 166 (1878). The FSIA limits, among other things, what claims the Plaintiffs may pursue, what they must prove to prevail on those claims, and whether those claims will be adjudicated by a court or a jury. Thus, the application of the FSIA runs afoul of the Due Process Clause and Plaintiffs' right to a jury trial. Plaintiffs' constitutional rights to due process and a jury trial converge with the Establishment Clause's prohibition against religious favoritism to compel the Court to curtail the FSIA's immunity protection in the unique case of the Holy See.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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# APPENDIX

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 07-5078/5163**

**[Filed February 10, 2009]**

| | |
|---|---|
| JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER, *Plaintiffs-Appellees / Cross-Appellants*, | ) |
| *v.* | ) |
| HOLY SEE, *Defendant-Appellant / Cross-Appellee.* | ) |

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 04-00338—John G. Heyburn II, Chief District Judge.

Argued: March 18, 2008

Decided and Filed: February 10, 2009

Before: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

## AMENDED OPINION

JULIA SMITH GIBBONS, Circuit Judge. Defendant Holy See appeals the district court's denial, in part, of its motion to dismiss all of plaintiffs' claims due to lack of subject matter jurisdiction. The Holy See contends that the district court has no subject matter jurisdiction over plaintiffs' claims because the Holy See is immune from suit as a foreign state pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* Plaintiffs James H. O'Bryan, Donald E. Poppe, and Michael J. Turner ("plaintiffs") cross-appeal the district court's partial grant of the Holy See's motion to dismiss. Plaintiffs claim that the FSIA does not immunize the Holy See from suit on the grounds alleged in their complaint and thus the district court does in fact have subject matter jurisdiction in this case. The United States as intervenor and *amicus* supports the position of the Holy See with respect to the Holy See's status as a foreign state and the constitutionality of the FSIA. For the following reasons, we affirm the decision of the district court.

I.

On June 4, 2004, plaintiffs, who claim to have been victims of sexual abuse by Roman Catholic clergy, filed a class action suit against the Holy See. The Holy See is both a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church. The United States has recognized the Holy See as a foreign sovereign since 1984. According to their complaint, plaintiffs consist of representatives for two separate classes. James H. O'Bryan and Donald E. Poppe serve as the representatives of Class I, which "consists of all persons who have not

previously brought claims against an agent or servant of the Defendant, Holy See, in the United States . . . arising out of sexual abuse he or she suffered at the hands of a Roman Catholic priest, cleric, bishop, archbishop, cardinal, agent or employee . . . ." Michael J. Turner serves as the representative of Class II, which "consists of all persons who have previously brought claims against an agent or servant of the Defendant, Holy See, in the United States . . . arising out of sexual abuse he or she suffered at the hands of a Roman Catholic priest, cleric, agent or employee . . . ." All three representatives were residents of Kentucky and citizens of the United States at the time of the alleged sexual abuse by local Catholic priests.

As representatives, the plaintiffs allege the following underlying facts in support of their suit.

> Plaintiff, James H. O'Bryan, was sexually abused, molested and assaulted by a Roman Catholic priest in the 1920s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.
>
> Plaintiff, Donald E. Poppe, was sexually abused, molested and assaulted by a Roman Catholic priest in the 1960s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.
>
> Plaintiff, Michael J. Turner, was sexually abused, molested and assaulted by a Roman

> Catholic priest in the mid 1970s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.

In all cases, plaintiffs allege that the sexual molestation in question "occurred while the abusive Roman Catholic priest, agent, servant or employee was acting within the scope of his employment, as part of an agency relationship with the Defendant, Holy See, and the misconduct was committed with the apparent authority arising from this employment and/or agency relationship."

Plaintiffs' claims regarding the liability of the Holy See stem, in large part, from their allegations regarding the purported policy of the Holy See towards accusations of sexual abuse leveled against clergy:

> [T]he Holy See has mandated that all allegations of childhood sexual abuse be kept under a cloak of complete secrecy, even if that secrecy violated state, federal, or international law. In March, 1962, the Holy See privately circulated a document containing a set of procedural norms for dealing with the solicitation of sex in confession, clergy sex with minors, homosexual relations, and bestiality. This document [the "1962 Policy"] – an official legislative text issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII – imposes the highest level of secrecy on the handling of clergy sexual abuse matters. . . . This secret document was first discovered and made public in July, 2003 by

> news media in the United States and throughout the world. The policies of the Holy See expressed in this and other documents require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even where such failure to report would itself be a criminal offense.

(Plaintiff's Complaint, Introduction.) On behalf of Class I, plaintiffs outline in their complaint the following causes of action:[1] violation of customary international law of human rights; negligence; breach of fiduciary duty; and the tort of outrage/intentional infliction of emotional distress. In addition, plaintiffs advance claims of deceit and misrepresentation against the Holy See "in its capacity as an Unincorporated Association and Head of an International Religious Organization Only." Finally, plaintiffs, on behalf of Class I, request injunctive relief.

On behalf of Class II, plaintiffs outline in their complaint the following causes of action: violation of customary international law of human rights; negligence; breach of fiduciary duty; and the tort of outrage/intentional infliction of emotional distress. In addition, plaintiffs advance claims of deceit and misrepresentation against the Holy See "in its capacity as an Unincorporated Association and Head of an

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[1] Plaintiffs also plead a separate cause of action titled "Respondeat Superior Liability." However, *respondeat superior* is not a cause of action. It is a basis for holding the Holy See responsible for the acts of its agents. Thus, *respondeat superior* will factor in to our discussion of the other claims advanced by plaintiffs but will not be treated separately.

International Religious Organization Only." Finally, plaintiffs, on behalf of Class II, request injunctive relief.

Plaintiffs assert in their complaint that federal subject matter jurisdiction exists in this case on a number of grounds. First, plaintiffs advance claims of federal jurisdiction under the FSIA, 28 U.S.C. § 1602 *et seq*. Assuming that the Holy See is a "foreign state" within the meaning of 28 U.S.C. § 1603, plaintiffs claim that federal jurisdiction attaches because (1) the Holy See has waived its immunity pursuant to 28 U.S.C. § 1605(a)(1); (2) the Holy See was acting in a commercial capacity pursuant to 28 U.S.C. § 1605(a)(2); or (3) the money damages that are sought are for personal injuries stemming from the Holy See's tortious conduct pursuant to 28 U.S.C. § 1605(a)(5).

Alternatively, assuming that the Holy See is not a "foreign state" within the meaning of 28 U.S.C. § 1603, plaintiffs assert that this court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

On April 4, 2005, the Holy See filed a motion to dismiss on the grounds that the plaintiffs' complaint failed to state a claim upon which relief can be granted, lack of subject matter jurisdiction, lack of personal jurisdiction, insufficient process and insufficient service of process. In its memorandum and opinion of October 7, 2005, the district court addressed the Holy See's claim that the service of process had been insufficient. In doing so, the district court began its analysis by determining that the Holy See was in fact a "foreign state" within the meaning of the FSIA.

In turn, the district court found that plaintiffs had not satisfied the service of process requirements under the FSIA, 28 U.S.C. § 1608(a). However, the district court found that because the plaintiffs had made good faith attempts to perfect service of process, it would grant them an additional 60 days in which to perfect service. *O'Bryan v. Holy See*, 490 F. Supp 2d 826, 832 (W.D. Ky. 2005) (*"O'Bryan I"*).

On January 10, 2007, the district court determined that plaintiffs had perfected service of process and therefore went on to consider the Holy See's motion to dismiss on the grounds that there was no subject matter jurisdiction in the instant case. In its memorandum and opinion, the district court determined that while subject matter jurisdiction did not exist for a number of plaintiffs' claims, a number of the plaintiffs' claims fell within the exceptions to the immunities granted foreign states under FSIA. In doing so, the district court concluded that plaintiffs had sufficiently pled that the clergy in the United States were Holy See's employees; in turn, because the Holy See had declined to provide evidence to the contrary, the district would presume that the clergy in question were in fact Holy See employees. However, the district court remained "open to reconsidering its decision that the United States-based bishops, archbishops, and other clergy of the Roman Catholic Church are employees of the Holy See for purposes of FSIA if further contrary evidence emerges during the litigation." The district court summarized its holdings as follows:

> In summary, this Court will dismiss the Plaintiffs' negligence claim that Defendant Holy See failed to provide safe care of children

> entrusted to the clergy. The Court also will dismiss Plaintiffs' deceit and misrepresentation claims. However, the Court will deny Defendant's motion to dismiss as to the failure to report and failure to warn negligence claims and as to all other claims asserted against the Holy See at this time. Therefore, the following claims remain against the Holy See: negligent failure to report, negligent failure to warn, breach of fiduciary duty (insofar as that breach involved the failure to report and the failure to warn), outrage and emotional distress, violations of the customary law of human rights, and claims under the doctrine of respondeat superior.

The Holy See appealed the district court's order denying, in part, its motion to dismiss and plaintiffs subsequently cross-appealed. In their Final Second Brief, the plaintiffs argued, for the first time, that the application of the FSIA to the Holy See violated the Establishment Clause. Because the plaintiffs' new contentions amounted to a challenge of the FSIA's constitutionality, the United States, pursuant to 28 U.S.C. § 2403(a), intervened as a matter of right to defend the constitutionality of the FSIA. The United States also intervened as an *amicus curiae* supporting the position of the Holy See regarding its status as a foreign sovereign. The United States took no position on the applicability of the statutory exceptions to immunity with respect to plaintiffs' claims.

II.

Because "sovereign immunity is an immunity from trial, not just a defense to liability on the merits, the

denial of a claim of sovereign immunity is immediately appealable under the collateral order doctrine as a final decision, pursuant to 28 U.S.C. § 1291." *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002). This court "review[s] de novo questions of subject matter jurisdiction." *Bauer v. RBX Indus.*, 368 F.3d 569, 578 (6th Cir. 2004) (citing *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000)). However, "[a] district court's decision to exercise supplemental jurisdiction over state law claims that are related to the federal question claim is reviewed only for abuse of discretion." *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 200 (6th Cir. 2004).

III.

As stated in 28 U.S.C. § 1604, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter." However, the FSIA does not itself define the term "foreign state." *See, e.g.*, *Ungar v. Palestinian Liberation Org.*, 402 F.3d 274, 283 (1st Cir. 2005).

In determining whether a particular entity constitutes a "foreign state" courts typically adopt one of two approaches. A number of courts have looked to the criteria enumerated in Restatement (Third) of the Foreign Relations Law of the United States § 201: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." *See Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 158-59 (D.D.C. 2006) (collecting cases); *see also Ungar*, 402 F.3d at

283 (noting that FSIA's legislative history makes it clear that the "objective of the bill was to codify sovereign immunity doctrine as recognized by international law and to ensure that this international standard would be applied in federal litigation"); *Morgan Guar. Trust Co. v. Republic of Palau*, 924 F.2d 1237, 1243 (2d Cir. 1991) (relying primarily on the Restatement standard for determining whether the appellee was a "foreign state" under FSIA). However, as the First Circuit noted in *Ungar*, "the Restatement standard . . . is not inevitably correct. It may be argued that a foreign state, for purposes of the FSIA, is an entity that has been recognized as a sovereign by the United States government." 402 F.3d at 284 n.6. Regardless, as the court noted in *Ungar*, when both standards lead to the same conclusion, courts need not choose as "all roads lead to Rome." *Id.*

In this case, there is no dispute that the United States recognized the Vatican in 1984,[2] and there is no dispute between the parties that the *State of the Vatican* is a foreign state within the meaning of FSIA. (Appellee's Br. 21 ("The Holy See, as State of the Vatican, meets the[] requirements [of the Restatement Standard]")). *See also Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 832 (S.D. Miss. 2004) (vacated on other grounds) (treating the Vatican as a foreign state for

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[2] *See, e.g., Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 197 (3d Cir. 1986) (noting that diplomatic relations between the United States and the Vatican began in 1984).

the purposes of the FSIA); *English v. Thorne*, 676 F. Supp. 761, 764 (S.D. Miss. 1987) (same).[3]

Plaintiffs, however, contend that the "Holy See . . . . *as the head of the Roman Catholic Church*, . . . has no defined territory and no permanent population, and thus does not" satisfy the definition of "foreign state" under the Restatement's standard. (Appellee's Br. 21 (emphasis added)).

Plaintiffs' argument remains somewhat obscure. As noted, plaintiffs admit that the Holy See, as State of the Vatican, is a foreign state within the meaning of FSIA. Thus, they do not dispute that the entity

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[3] Plaintiffs argue that because the conduct in question preceded the United States' recognition of the Holy See as a foreign sovereign, this court should not apply FSIA. This argument also fails. First, as a general principle of international law, "recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918). More importantly, "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (emphasis in original) (holding that FSIA can be retroactive in application) (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)). Thus, the purpose of FSIA is to grant immunity based upon the current relationship between the United States and the relevant foreign sovereign. Because the United States currently has diplomatic relations with the Holy See, foreign sovereign immunity applies even to prior conduct.

recognized by the United States government as a foreign state is indeed a foreign sovereign. Instead, plaintiffs appear to advance one of two arguments. The first possible interpretation of plaintiffs' argument is that they ask this court to conceive of the Holy See as two separate entities – first, a foreign sovereign, recognized by the United States government, and second, an unincorporated head of an international religious organization (Appellee's Br. 21 ("The Holy See, as State of the Vatican, meets the[] requirements [of the Restatement Standard]," but the "Holy See .... as the head of the Roman Catholic Church, ... has no defined territory and no permanent population, and thus does not" satisfy the definition of "foreign state" under the Restatement's standard")). Alternatively, they ask this court not to consider the Holy See, a single entity, a foreign sovereign in this case because the Holy See was acting in a non-sovereign capacity when it engaged in the conduct alleged in plaintiffs' complaint. Compl. ¶ 22 ("At the same time, and wholly distinct and separate from its role and activities as a sovereign, [the Holy See] is an unincorporated association and head of the Roman Catholic Church, an international religious organization.").

Plaintiffs' argument fails under either construction. With respect to the first alternative – the two-entity alternative – the district court correctly noted that "[p]laintiffs cite no authority for the proposition that the Holy See may be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization." *O'Bryan I*, 490 F. Supp. 2d at 830. To the contrary, courts have generally treated the Holy See as a foreign state for purposes of the FSIA. *See Dale*, 337 F. Supp. 2d at 832 (treating the Vatican as a foreign state for the

purposes of the FSIA); *English*, 676 F. Supp. at 764 (concluding that the Vatican is a foreign state for the purposes of the FSIA); *Doe v. Holy See*, 434 F. Supp. 2d 925, 933 (D. Or. 2006) (applying FSIA's foreign state status to the Holy See). Consequently, we reject plaintiffs' contention that they are not suing the Holy See that has been recognized by the United States government, but a parallel non-sovereign entity conjured up by the plaintiffs.

The structure and intent of the FSIA also counsel us to reject the plaintiffs' alternative capacity approach. As the Supreme Court has explained, by enacting FSIA, Congress intended to adopt the "restrictive theory" of sovereign immunity, "under which 'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Permanent Mission of India to the U.N. v. City of New York*, 127 S. Ct. 2352, 2357 (2007) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976)).

In order to implement the "restrictive theory" of sovereign immunity and limit immunity to sovereign acts but not private acts, Congress crafted exceptions to FSIA. *See* 28 U.S.C. 1605(a). For example, "[t]he 'commercial activity' exception of the FSIA withdraws immunity in cases involving essentially private commercial activities of foreign sovereigns that have an impact within the United States." *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *see also Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 983 (10th Cir. 2007) ("The FSIA's commercial activity exceptions, however, permit a foreign sovereign to be sued in a court within the

United States, to the same extent as any private individual . . . ."). In this way, Congress constructed the FSIA to immunize foreign sovereigns acting in a public capacity, while ensuring that essentially private activities would be actionable under the FSIA exceptions.

For these reasons, the Supreme Court has stated "[w]e think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *accord Am. Telecom Co., L.L.C. v. Republic of Leb.*, 501 F.3d 534, 538 (6th Cir. 2007). This conclusion stems from the FSIA's rule-plus-exceptions structure; if a party believes that the foreign state was not acting in its capacity as a sovereign, but instead in its private capacity, then the party can seek redress via one of the FSIA's exceptions.

Thus, if plaintiffs believe that the Holy See acted in a private capacity, then the plaintiffs are limited to arguing that an exception to the FSIA applies; such claims cannot serve as reasons to avoid the FSIA altogether. The exceptions to FSIA capture all instances where Congress has deemed conduct, if pursued by a foreign sovereign, sufficiently private so as to eliminate foreign sovereign immunity. In turn, the alternative-capacity argument can only succeed to the extent that it identifies conduct that fits within

one of the exceptions outlined under FSIA. *See* 28 U.S.C. § 1605(a).[4]

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[4] Both the Holy See and the United States argue that this court should refrain from making a determination regarding whether the Holy See is a foreign sovereign because such an issue is a nonjusticiable political question. They rely on the following language: "It has been specifically decided that 'Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.'" *Oetjen*, 246 U.S. at 302 (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)); *see also United States v. Belmont*, 301 U.S. 324, 328 (1937) ("[T]hat who is the sovereign of a territory is not a judicial question, but one the determination of which by the political departments conclusively binds the courts; and that recognition by these departments is retroactive and validates all actions and conduct of the government so recognized from the commencement of its existence.").

This argument misapprehends the nature of the court's inquiry. Plaintiffs do not ask this court to contravene the executive branch's recognition of the Holy See as a foreign sovereign. Instead, they either ask this court to determine that they can rightfully bring suit against a parallel religious entity that also goes by the name "Holy See" or that the conduct of the Holy See rendered it a private actor *in this case*. Courts routinely determine whether incorporated entities satisfy the criteria necessary to be considered an agency or instrumentality of a recognized foreign state pursuant to 28 U.S.C. § 1603(b) without becoming entangled in a non-justiciable political question. *See,e.g.*, *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988) (agreeing with the district court's determination that the corporation in question could qualify for foreign sovereign immunity status because the majority owner of the corporation was a foreign state) (abrogated on other grounds by *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) (same). And courts can consider the conduct of the Holy See in order to

IV.

We next consider the plaintiffs contention that the FSIA, as applied to the Holy See, violates the Establishment Clause.

"Issues that are not squarely presented to the trial court are considered waived and may not be raised on appeal." *Thurman v. Yellow Freight Sys.*, 90 F.3d 1160, 1172 (6th Cir. 1996). Similarly, "vague references fail to clearly present the objection in the district court so as to preserve the issue for appellate review." *Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1399 (6th Cir. 1995).

Plaintiffs contend that they preserved their constitutional claims by articulating them in their response to the Holy See's motion to dismiss. However, plaintiffs' response brief includes no such constitutional claims. Plaintiffs' response to *the Holy See's* First Amendment challenges cannot preserve plaintiffs' own Establishment Clause claim. Thus, plaintiffs waived their constitutional challenges to the FSIA.[5]

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determine whether the type of conduct alleged should cause the Holy See to lose its sovereign immunity. *See* 28 U.S.C. § 1605(a).

[5] Although this court "may exercise [its] discretion to review an issue not raised below in exceptional cases or particular circumstances, or when the rule would produce a plain miscarriage of justice," *United States v. Chesney*, 86 F.3d 564, 567-68 (6th Cir. 1996) (internal quotation marks and citation omitted), we see no such exceptional circumstances in this case.

V.

We next address the Holy See's contention that the district court misapplied the FSIA's burden-shifting process.

In the proceedings before the district court, the Holy See filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This motion presented a facial attack to plaintiffs' complaint.

As this court has previously noted, "Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). "A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading." *Id.* And, "[w]hen reviewing a facial attack, a district court takes the allegations in the complaint as true . . . . If those allegations establish federal claims, jurisdiction exists." *Id.* However, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005).

Applying the standards under 12(b)(1) to the FSIA context is complicated by FSIA's burden-shifting process. "The party claiming FSIA immunity bears the initial burden of proof of establishing a prima facie case that it satisfies the FSIA's definition of a foreign state; once this prima facie case is established, the burden of production shifts to the non-movant to show

that an exception applies." *Keller*, 277 F.3d at 815. The party claiming immunity under FSIA retains the burden of persuasion throughout this process. *Id.*

The Holy See contends that this burden-shifting process was misapplied by the district court. In addressing the Holy See's motion to dismiss, the district court explained that "once the *asserted allegations* bring claims within the statutory exceptions to FSIA, the burden then shifts to the party asserting immunity to prove that the exceptions do not apply." *O'Bryan v. Holy See*, 471 F. Supp. 2d 784, 791 (W.D. Ky. 2007) ("*O'Bryan II*") (citing *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 707-08 (9th Cir. 1992)) (emphasis in original). The Holy See, however, argues that the burden-shifting analysis, because of its reliance on evidence from the parties, cannot be applied to a facial motion to dismiss, which simply attacks the legal sufficiency of the complaint.

Federal courts have consistently applied the FSIA's burden-shifting process to facial motions to dismiss; in doing so, courts simply look to the general standards for evaluating motions to dismiss pursuant to Rule 12(b)(1) and take the factual allegations of the plaintiff as true. *See, e.g.*, *Siderman de Blake*, 965 F.2d at 708 n.9 (noting that "even if the [plaintiffs] had presented nothing more than the allegations in their complaint . . . it would have been incumbent upon [defendant] to respond to those allegations"); *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004) ("[I]f the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the [FSIA]

exceptions to immunity invoked by the plaintiff.") (quoting *Phoenix Consulting, Inc. v. Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000)); *Doe*, 434 F. Supp. 2d at 933 ("If the foreign state makes [the "foreign state"] showing, the burden of production shifts to the plaintiff to show, *either by the allegations in the complaint* or by extrinsic evidence, that at least one of the FSIA exceptions applies. Once the plaintiff offers evidence that an exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." (internal citations and quotation marks omitted; emphasis added)).

We conclude that the district court correctly applied the FSIA's burden shifting process. It accurately described the process. *O'Bryan II*, 471 F. Supp. 2d at 790-91. It considered the allegations in plaintiffs' complaint that a number of exceptions to FSIA immunity applied and concluded that the tortious act exception did in fact apply. *O'Bryan II*, 471 F. Supp. at 792. As the district court correctly noted, the Holy See could still retain immunity if it could "prove that the exceptions do not apply." *Id.* at 791. Such proof would presumably amount to a "factual attack" pursuant to Rule 12(b)(1). *Cf. Gentek Bldg. Prods.*, 491 F.3d at 330 ("Where . . . there is a factual attack on the subject-matter jurisdiction alleged in the complaint, no presumptive truthfulness applies to the allegations.").

VI.

Because the plaintiffs can only bring suit against the Holy See in its capacity as a foreign sovereign, the district court has subject matter jurisdiction over the dispute only if the Holy See is "not entitled to

immunity [under any of the the FSIA exceptions]." *See* 28 U.S.C. § 1330(a). Title 28 U.S.C. § 1605(a) provides the following relevant exceptions to a foreign state's immunity under the FSIA:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;[6]
> >
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
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> > . . .
> >
> > (5) not otherwise encompassed in paragraph (2) above, in which money damages are

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[6] While plaintiffs raised the waiver exception in their complaint, they have abandoned this argument in their briefs before this court.

> sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> > (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> >
> > (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . . .

The district court determined that the "commercial activity" exception did not apply, *O'Bryan II*, 471 F. Supp. 2d at 789, a determination that the plaintiffs contest in their cross-appeal.[7] The district court also

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[7] The Holy See argues that this court has no jurisdiction to hear plaintiffs' cross-appeal. This court has jurisdiction to hear the Holy See's appeal because the "denial of sovereign immunity is immediately appealable under the collateral order doctrine as a final decision, pursuant to 28 U.S.C. § 1291." *Keller*, 277 F.3d at 815. In order to hear plaintiffs' cross-appeal, this court would have to exercise pendent jurisdiction: "The doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are 'inextricably intertwined' with matters over which the appellate court properly and independently has jurisdiction." *Chambers v. Ohio Dep't of Human*

found that it had subject matter jurisdiction over some of the plaintiffs' claims under the "tortious act" exception, *id.* at 792, a determination that the Holy See now appeals. We will consider the application of the various exceptions to sovereign immunity under the FSIA in turn.

**a. The Commercial Activity Exception**

As noted above, the commercial activity exception reads as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of

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*Servs.*, 145 F.3d 793, 797 (6th Cir. 1998). "A pendent appellate claim can be regarded as 'inextricably intertwined' with a properly reviewable claim only if the pendent claim 'is coterminous with, or subsumed in, the claim before the court on interlocutory appeal.'" *Id.* (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1025, 1028 (10th Cir. 1998)). To be sure, "[t]he 'inextricably intertwined' requirement of pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue." *Id.*

Despite this strict standard for pendent jurisdiction, we conclude that pendent jurisdiction should be exercised in this case. Plaintiffs seek to challenge the district court's ruling on the applicability of the commercial activity exception of the FSIA. The ultimate issue of this interlocutory appeal – whether the Holy See is immune from suit pursuant to the FSIA – also hinges on a finding that this exception does not apply. Moreover, given the relatedness of the two exceptions, judicial economy would counsel hearing these two issues together. *Cf. Rendall-Speranza v. Nassim*, 107 F.3d 913 (D.C. Cir. 1997) (exercising pendent appellate jurisdiction pursuant to an interlocutory appeal of the denial of sovereign immunity under the FSIA).

> the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

28 U.S.C. § 1605(a)(2). "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). In addition, "the commercial activity relied upon by plaintiff for jurisdictional purposes must be also the activity upon which the lawsuit is based; that is, there must be a connection between that activity and the act complained of in the lawsuit." *Gould*, 853 F.2d at 452 (citing *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591 (6th Cir. 1986)).

The Supreme Court has further analyzed the statutory definition of commercial activity, stating that

> [W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather

> than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.

*Republic of Arg.*, 504 U.S. at 614 (internal quotation marks and citations omitted). By "withdraw[ing] immunity in cases involving essentially private commercial activities," the commercial activity exception "reflects the 'restrictive' theory of sovereign immunity that underlies the FSIA." *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994).

The Supreme Court applied the *Weltover* standard in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). In *Nelson*, the plaintiff, a United States citizen and a former employee of the Saudi government, had allegedly been imprisoned and tortured by Saudi officials for reporting defects regarding hospital equipment to a Saudi government commission. Upon release, the plaintiff filed suit against the Saudi government, alleging, *inter alia*, that the government was negligent in its failure to warn him of the undisclosed dangers of his employment position (*i.e.* the likelihood of being imprisoned and tortured). *Id.* at 352-54. In finding that the Saudis' conduct was not commercial in nature, the Supreme Court analyzed Nelson's claims as follows:

> [T]he intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature . . . . Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce.

*Id.* at 361-62. Indeed, directly addressing Nelson's attempt to advance a failure-to-warn theory of the case, the Supreme Court responded:

> [T]his is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

*Id.* at 363.

The analysis in *Weltover* and *Nelson* points to two distinct limitations on the application of the commercial activity exception. First, the activity must be of the type in which private individuals engage; if

the activities in question are not private, but sovereign in nature, then the commercial activity exception will not apply. This flows from the purpose of the commercial activity exception – to encapsulate the restrictive theory of sovereign immunity, which grants immunity for the public, not private, actions of a sovereign. *Permanent Mission of India to the UN v. City of New York*, 127 S. Ct. 2352, 2357 (2007) (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976)); *see also City School of Detroit v. Government of France*, 1990 U.S. Dist. LEXIS 19577, at *9-*10 (E.D. Mich. 1990) (concluding that the commercial activity exception did not apply because "[t]he granting of accreditation to a private school by a foreign government is by its very nature a sovereign function, incapable of being performed by a private individual [and] . . . the welfare and education of its citizenry is . . . an area where sovereign activity is typically asserted").

Second, the *Weltover* and *Nelson* cases also instruct courts to avoid the artful pleading of plaintiffs and look to the core of the activities alleged to be commercial in nature. Thus, the Southern District of New York has explained that "*Nelson* rest[s] on a broader principle, directing district courts first to ascertain the claim's gravamen to determine whether the FSIA plaintiff is simply using creative nomenclature as a semantic ploy to shroud the true essence of its theory and obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." *Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah*, 184 F. Supp. 2d 277, 299 (S.D.N.Y. 2001) (internal quotation marks and citation omitted). District courts have applied both limiting principles in instructive contexts.

Employing this principle, the District of Oregon has recently considered the commercial activity exception in circumstances similar to our own. In *Doe v. Holy See*, the district court of Oregon considered the applicability of the commercial activity exception to claims against the Holy See stemming from the alleged abuse of the plaintiff by his priest, a Holy See employee. 434 F. Supp. 2d at 937-47. After a lengthy analysis of the term "commercial activity" under the FSIA, the district court stated as follows:

> [T]he Supreme Court has counseled courts not to lose sight of the ultimate issue: whether the true essence of the complaint is commercial. *Nelson*, 507 U.S. at 363. Here, plaintiff's complaint does not allege property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial. Instead, at the heart of plaintiff's complaint is the injury inflicted by a sexually abusive priest at plaintiff's church, a claim clearly sounding in tort.

*Id.* at 942. In other words, the *Doe* Court did not rely on the public-private inquiry, but instead it examined the "gravaman" of the claims advanced by the plaintiff. *See Leutwyler*, 184 F. Supp. 2d at 299. Regardless of how the plaintiff phrased his complaint, none of the allegations truly sounded in commercial activity, and thus the commercial activity exception did not apply. *Doe*, 434 F. Supp. 2d at 947.

Both limiting principles apply to plaintiffs' attempt to invoke the commercial activity exception in our own

case. On one front, all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See. Indeed, in arguing that the discretionary function exception did not apply, plaintiffs themselves emphasize the force of the purported policy and the potential for sanction if Holy See employees chose not to comply.

In addition, the gravaman of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees. Thus to allow plaintiffs to obtain jurisdiction under the commercial activity exception through a semantic ploy would allow them to "obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." *See Leutwyler*, 184 F. Supp. 2d at 299. We therefore conclude that the commercial activity exception does not apply.

**b. The Tortious Act Exception**

Pursuant to the FSIA, a plaintiff can establish subject matter jurisdiction over a foreign sovereign under the tortious act exception if there has been a tortious act (1) "occurring in the United States"; (2) "caused by [a] tortious act or omission"; (3) where the alleged acts or omissions were those of a "foreign state or of any official or employee of that foreign state"; and (4) those acts or omissions were done within the scope of tortfeasor's employment. *See* 28 U.S.C. § 1605(a)(5).

Because, however, there are exceptions to the tortious act exception, our inquiry does not end here. If the tortious act in question was either (1) "based upon the exercise or performance or the failure to

exercise or perform a discretionary function" or (2)"ar[o]s[e] out of . . . misrepresentation [or] deceit . . ." then the foreign sovereign retains its immunity. 28 U.S.C. § 1605(a)(5)(A), (B).

In determining whether the tortious act exception applies, courts, as a rule, apply state substantive law: "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 622 n.11 (1983); *see also Pescatore v. PAN AM*, 97 F.3d 1, 12 (2d Cir. 1996) (stating that "the FSIA thereby operates as a 'pass-through' to state law principles"). Thus, "[a]s a general rule, state law should provide a cause of action against a foreign nation in a section 1605(a)(7) claim [under the Tortious Act Exception]." *Damarrell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, at *55 (D.D.C. 2005). Therefore, to determine the applicability of the tortious act exception, we must consider the elements of the exception, applying Kentucky state law where applicable.[8]

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[8] As noted above, the class representatives all resided in the state of Kentucky at the time of the alleged abuse. "[I]n FSIA cases, we use the forum state's choice of law rules to resolve 'all issues,' except jurisdictional ones." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002). According to Kentucky's choice of law rules, Kentucky law would apply where Kentucky is the state where the relevant acts or omissions occurred. *See, e.g., Vaughn v. United States*, 1997 U.S. App. LEXIS 35795, at *9 n.2 (6th Cir. Dec. 16, 1997) (applying Kentucky law in a case arising under the Federal Tort Claims Act).

However, the choice of law inquiry is complicated by the fact that the case before is us is a class action suit. Under *Phillips*

### i. Elements of the Tortious Act Exception

#### (a) "Occurring in the United States"

"Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs in the United States." *Amerada Hess Shipping Corp.*, 488 U.S. at 439 (emphasis omitted). Thus, in contrast to the commercial activity exception, a tortious act having "direct effects" in the United States will not satisfy the requirements of the tortious activity exception. *Id.* at 441. Courts in both the Second and D.C. Circuits have interpreted this requirement to mean that the "entire tort" must occur in the United States. *See, e.g.*, *Asociacion de*

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*Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), due process requirements apply to nationwide class action lawsuits, requiring courts to engage in individualized choice of law analysis for each plaintiff's claims and not just named plaintiffs. *Id.* at 822-23.

But the individualized choice of law analysis is only necessary once the class seeks certification. While the class remains a putative class, courts focus on the application of the forum's choice of law rules to the named plaintiffs. *Cunningham v. PFL Life Ins. Co.*, 42 F. Supp. 2d 872, 883 (N.D. Iowa 1999) ("[I]t is important to note that at this point in the litigation, the Court has not certified the Plaintiffs as class representatives. Accordingly, the Court will not make a choice of law determination that will bind the putative class in this Order. This Order only contemplates the claims of the named Plaintiffs . . . ."); *cf. Rakes v. Life Investors Ins. Co. of Am.*, 2007 U.S. Dist. LEXIS 52719, at *33 (N.D. Iowa July 20, 2007) ("[I]n the case at bar the court has not yet certified Plaintiffs as class representatives. Therefore, nothing in this order may be construed as a non-individualized choice-of-law determination that binds all 150,000 putative members of the Class."). We, in the instant case, need not engage in such an individualized choice of law analysis because plaintiffs have not yet sought certification.

*Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (rejecting application of the tortious activity exception because "the entire tort would not have occurred [in the United States]"); *Kline v. Kaneko*, 685 F. Supp. 386, 391 (S.D.N.Y. 1988) ("If the non-commercial tort exception is to apply, the entire tort must be committed in the United States."); *see also Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks)*, 349 F. Supp. 2d 765, 795 (S.D.N.Y. 2005) (collecting Second Circuit cases). *But see Olsen v. Gov't of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984) (abrogated on other grounds by *Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1026 (1987)) ("[I]f plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5).").

We join the Second and D.C. Circuits in concluding that in order to apply the tortious act exception, the "entire tort" must occur in the United States. This position finds support in the Supreme Court's decision in *Amerada Hess Shipping*: "the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." 488 U.S. at 441. Moreover, the purpose of the tortious activity exception is limited: "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Id.* at 439-40 (citing H.R. Rep., at 14). Thus, it seems most in keeping with both Supreme Court precedent and the purposes of the FSIA to grant subject matter jurisdiction under the tortious activity exception only to torts which were entirely committed within the United States.

### (b) Caused by an Act or Omission

In Kentucky, "[l]iability for a negligent act follows a finding of proximate or legal cause," which is defined as "a finding of causation in fact, i.e., substantial cause, and the absence of a public policy rule of law which prohibits the imposition of liability." *Deutsch v. Shein*, 597 S.W.2d 141, 143-44 (Ky. 1980). "In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . The negligence must also be a substantial factor in bringing about the plaintiff's harm." *Id.* (quoting Restatement of Torts (Second) § 431, cmt. a).

### (c) Official or Employee of a Foreign State

Kentucky law appears to have adopted the Restatement (Third) of Agency § 7.07 definition of employee when addressing claims of vicarious liability: "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . . ." *Papa John's Int'l, Inc. v. McCoy*, 2008 Ky. LEXIS 16, at *16 (Ky. 2008) (quoting Restatement (Third) of Agency § 707).[9] In

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[9] The Holy See contends that plaintiffs failed to identify specifically which clergy engaged in the relevant tortious conduct. As a result, the Holy See seizes upon the language in the complaint which names the "Louisville Corporation" as one of the agents of the Holy See having engaged in the tortious conduct; in turn, the Holy See argues that all of the allegations in the complaint can only be analyzed in terms of the actions of the Louisville Corporation. And, the Holy See believes that corporate law prevents holding it liable for the actions of another corporate

addition, "the fact that work is performed gratuitously does not relieve a principal of liability." *Id.*

### (d) Scope of Employment

"State law, not federal common law, governs whether an officer's or employee's action is within the scope of employment in determining the applicability of the FSIA." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) (applying Mississippi law) (citing *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983)); *see also, e.g.*, *Doe*, 434 F. Supp. 2d at 944 (applying Oregon law); *Robinson v. Gov't of Malay.*, 269 F.3d 133, 145 (2d Cir. 2001) (applying New York law); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 326-27 (9th Cir. 1996) (applying California law). Because the conduct alleged by the named plaintiffs occurred in Kentucky, Kentucky law applies to the instant case.

Under Kentucky law, for alleged conduct to be considered within the scope of employment "the

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entity. However, this analysis begins with a faulty premise. Plaintiffs pled repeatedly that the tortious acts of which they complain were also committed by priests, clerics, bishops, archbishops, cardinals, agents and employees. General allegations against employees are sufficient for the purposes of notice pleading: "a complaint that generally alleges an employer's negligence need not specifically identify each employee involved to hold the employer liable under respondeat superior." *Cornejo-Ramirez v. James G. Garcia, Inc.*, 2000 U.S. Dist. LEXIS 20064, at *13 (D. Ariz. 2000) (also noting "[t]he court is required to examine Plaintiffs' complaint under the standard set forth in Fed R. Civ. P. 8(f) that 'all pleading shall be so construed as to do substantial justice'").

conduct must be of the same general nature as that authorized or incidental to the conduct authorized." *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000). Thus, "[u]nder the doctrine of respondeat superior, an employer can be held vicariously liable for an employee's tortious actions if committed in the scope of his or her employment." *Papa John's Int'l*, 2008 Ky. LEXIS 16, at *28-*29. "In the area of intentional torts, the focus is consistently on the purpose or motive of the employee in determining whether he or she was acting within the scope of employment." *Id.* at *29. However, "[a] principal is not liable under the doctrine of respondeat superior unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment." *Osborne*, 31 S.W.3d at 915. Applying these principles, the Kentucky Supreme Court ruled that a priest's adulterous conduct could not be considered within the scope of his employment, even though the underlying conduct was intentional. *Osborne*, 31 S.W.3d at 915.

**ii. Exceptions to the Tortious Act Exception**

**(a) Discretionary Function Exception to the Tortious Act Exception**

The FSIA does not define "discretionary functions." To interpret the FSIA's discretionary function exception, courts typically apply the interpretation of the discretionary function exception of the Federal Tort Claims Act (the "FTCA"), because "[n]ot only does the language of the FSIA discretionary function exception replicate that of the [FTCA], 28 U.S.C. § 2680(a), but the legislative history of the FSIA, in

explaining section 1605(a)(5)(A), directs us to the FTCA." *Olsen*, 729 F.2d at 646 (citing H.R. Rep. at 21); *see also Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 8 (1st Cir. 2002); *Office of Consulate Gen. of Nig.*, 830 F.2d at 1026 (9th Cir. 1987).

In determining whether particular conduct falls under the FTCA's, and in turn under the FSIA's, discretionary function exception, courts apply the two part *Berkovitz* test:

> The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability - that is, whether the choice or judgment was one involving social, economic or political policy.

*Vickers v. United States*, 228 F.3d 944, 949 (9th Cir. 2000) (internal citations omitted) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)); *Rodriguez*, 297 F.3d at 9 (applying the two-part *Berkovitz* test to the FSIA's discretionary function exception). The Supreme Court in *Berkovitz* explained the rationale behind the discretionary function exception:

> The basis for the discretionary function exception was Congress' desire to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the

> medium of an action in tort. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.

*Berkovitz*, 486 U.S. at 536-37 (internal quotation marks and citation omitted).

A number of courts have applied the *Berkovitz* test to cases of negligent hiring, concluding that the selection of employees, officials and officers typically falls within the scope of the FTCA's discretionary function exception. *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315, 332-34 (1991) (finding that the negligent selection of directors and officers falls squarely under the FTCA's discretionary function exception); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("The hiring, training, and supervision choices that [the defendant] faces are choices susceptible to policy judgment. The hiring decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, individual backgrounds, office diversity, experience and employer intuition." (internal quotation marks and citation omitted)); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995) ("The post office's choice between several potential employees involves the weighing of individual backgrounds, office diversity, experience and employer intuition. These multi-factored choices require the balancing of competing objectives, and are of the nature and quality that Congress intended to shield from tort liability." (internal quotation marks and citation omitted)); *cf. Carlyle v. United States, Dep't of Army*, 674 F.2d 554, 557 (6th Cir. 1982) ("Any decision to supervise [army recruits] only by means of

letters and not to place personnel in the Hotel was a discretionary function and outside federal jurisdiction.").

### (b) Arising Out of Misrepresentation or Deceit Exceptions to the Tortious Act Exception

The scope of the misrepresentation or deceit exception to the tortious act exception is an unsettled matter. Courts generally have looked to the definition of misrepresentation in the FTCA as a guide for defining the term under the FSIA, relying on the legislative history of the FSIA for such comparison. *See, e.g.*, *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 n.4 (2d Cir. 1999) ("The FSIA House Report provides that 'the exceptions provided in subparagraph[] . . . (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the [FTCA], 28 U.S.C. 2680(a) and (h).") (quoting H.R. Rep. at 21); *see also De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1398 (5th Cir. 1985).

In addition, both the Second and Ninth Circuits have dismissed claims against foreign sovereigns where the foreign sovereign allegedly provided false or misleading information regarding the whereabouts of the plaintiffs' relatives. *See Cabiri*, 165 F.3d 193, 200 (dismissing claim "for emotional injury caused by the refusal of a foreign state, however nefarious, to give its citizens in the United States full or truthful information concerning its operations"); *Kozorowski v. Russian Fed'n*, No. 93-16388, 1997 U.S. App. LEXIS 26266 (9th Cir. Sept. 19, 1997) (dismissing claims of intentional infliction of emotional distress, fraud and

deceit, conspiracy and other claims because they were premised on the Soviet Union's failure to disclose its role in the 1940 massacre of Polish soldiers and therefore arose out of misrepresentation and deceit).

### iii. Application of the Tortious Act Exception to the Instant Case

The difficulty in applying the elements of the tortious act exception to plaintiffs' complaint is the manner in which plaintiffs have pled their claims. In their complaint, plaintiffs advance the following claims: violation of customary international law of human rights, negligence, breach of fiduciary duty, tort of outrage/infliction of emotional distress, deceit and misrepresentation.[10] In each of their claims, plaintiffs base their theories of liability not only on the actions of the Holy See itself, but also on the acts of the Holy See's agents and employees. As a result, we must analyze each claim to see not only which claims survive, but which *parts* of each claim survive.

Looking first to the fourth requirement for the application of the tortious act exception, the Kentucky Supreme Court's holding in *Osborne*, 31 S.W.3d at 915, leads to the inescapable conclusion that the alleged acts of sexual abuse were not done while the alleged tortfeasors were acting within the scope of their employment. Thus, the tortious act exception to the FSIA's grant of immunity cannot apply to permit suit against the Holy See for sexual abuse by its clergy, even if the other requirements for its application are met.

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[10] *See supra*, n.1.

Furthermore, as per the FSIA's explicit terms, in order for the tortious act exception to apply, the tortious acts in question must have occurred in the United States. Therefore, any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive. For example, the tortious act exception to the FSIA's grant of immunity would not include any theory of liability premised on the Holy See's own negligent supervision because such acts presumably occurred abroad; moreover, a direct claim leveled against the Holy See for promulgating the 1962 Policy would not fall within the tortious act exception because it too presumably occurred abroad. In turn, plaintiffs cannot pursue claims based upon the alleged sexual abuse of priests or based upon the acts of the Holy See that occurred abroad.[11]

These conclusions are not wholly dispositive, however, of the claims against the Holy See. As noted before, plaintiffs' claims are not based solely on the conduct of the Holy See itself or the allegedly abusive conduct of priests. All of plaintiffs' claims also advance theories of liability premised on the conduct of Holy See employees in the United States engaged in the supervision of the allegedly abusive priests. These

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[11] Plaintiffs appear to have agreed with these applications of the tortious act exception: "The Plaintiffs do not seek to hold the Defendant vicariously liable for the acts of its priests; rather, they seek to hold the Defendant vicariously liable for the acts of its bishops and archbishops who, following the directives of the Defendant, permitted childhood sexual abuse to occur." Indeed, the alleged torts committed by the bishops and archbishops occurred entirely within the United States. Moreover, complying with the alleged 1962 Policy would fall within the scope of the bishops' and archbishops' employment.

portions of plaintiffs' claims meet the four requirements for application of the tortious act exception.

First and contrary to the Holy See's protestations, plaintiffs have pled both that the relevant archbishops, bishops and other Holy See personnel had knowledge of the alleged sexual abuse of priests and that they failed to act on that knowledge. In doing so, it would seem that the complaint also pleads that conduct of the archbishops, bishops and other Holy See personnel were a substantial factor in causing plaintiffs' damages, satisfying Kentucky's causation requirements.

In addition, and as already noted, tortious acts committed by bishops, archbishops and other Holy See personnel while engaged in the supervision of allegedly abusive priests satisfy the requirements of the FSIA's tortious act exception that the tortious act occur in the United States and within the scope of employment.

Also, for the conduct of bishops and archbishops and other Holy See personnel to serve as a basis for jurisdiction under the tortious act exception, these bishops, archbishops and Holy See personnel must have been employees of the Holy See. As noted above, under Kentucky law, this inquiry focuses on the degree of control exercised by the employer over the individual or individuals in question. In their complaint, plaintiffs allege facts that demonstrate that the Holy See exercised a significant degree of control over the bishops and archbishops accused of having committed the tortious acts in question. Taking these

allegations as true, plaintiffs have sufficiently pled the employee element of the tortious activity exception.[12]

Thus, the portions of plaintiffs' claims that are based upon the conduct of bishops, archbishops and Holy See personnel while supervising allegedly abusive clergy satisfy all four requirements of the tortious act exception: this conduct served as a substantial cause of the alleged abuse; the conduct occurred in the United States; the conduct was within the scope of employment; and these individuals were, according to the pleadings, Holy See employees.

However, although the four requirements are met for these claims, we must still consider whether either of the two exceptions to the tortious act exception applies and prevents its application: the discretionary--function exception and the arising-out-of misrepresentation-or-deceit exception.

According to the allegations in plaintiffs' complaint, theories of liability premised upon the supervision of the allegedly abusive clergy do not implicate the discretionary function exception to the tortious act exception because the terms of the supervision were not discretionary. According to the complaint, the 1962 Policy "impose[d] the highest level of secrecy on the handling of clergy sexual abuse matters." Plaintiffs contend that this required secrecy prohibited Holy See personnel from, among other things, reporting childhood sexual abuse to government authorities. *Id.* Thus, following the 1962 Policy cannot, on the

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[12] As noted above, the district court also correctly employed the FSIA burden-shifting analysis in connection with this inquiry.

pleadings in plaintiffs' complaint, be deemed discretionary. We now apply these general conclusions to each of the plaintiffs' remaining claims.[13]

1) **Violation of Customary International Law of Human Rights** (Class I Claim II, Class II Claim I): Plaintiffs plead this claim against the Holy See itself, stating that

> [t]he instructions, mandates and dictates of the Defendant, Holy See in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control, thereby placing children in a position of peril, is a gross violation of well-established, universally recognized norms of international law of human rights.

This claim does not survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the promulgation itself occurred abroad. However, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.

2) **Negligence** (Class I Claim III, Class II Claim II): Plaintiffs present three grounds for negligence in their complaint: failure to provide "safe care"; failure to "warn"; and failure to report. The failure to warn and failure to report prongs of the negligence claim survive because they are premised on the conduct of Holy See

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[13] *See supra* n.1.

employees who were allegedly negligent in their supervision of abusive clergy. However, the claims of negligence against the Holy See for its own conduct cannot survive because such negligence would not have occurred in the United States. Furthermore, the claim of failure to provide safe care does not survive. As the district court noted, the failure to provide safe care amounts to a claim for negligent hiring. *O'Bryan II*, 471 F. Supp 2d at 793. And, as outlined above, claims of negligent hiring fall within the discretionary function exception. Indeed, the 1962 Policy, even according to plaintiffs' allegations, only required Holy See employees not to disclose information regarding sexual misconduct, not to actually hire individuals who had engaged in prior sexual misconduct.

3) **Breach of Fiduciary Duty** (Class I Claim IV, Class II Claim III): Plaintiffs plead this claim against the Holy See itself, stating that "a special legal relationship existed between the Plaintiffs and the Defendant Holy See, in the nature of a fiduciary relationship, which was carried out by and through priests, clerics, and administrators under the absolute control of the Defendant . . . ." In turn, plaintiffs contend that the "Defendant breached fiduciary duties owed to the Plaintiffs," premised upon the "duty to warn parents" and the "duty to report known or suspected perpetrators. This claim survives against the Holy See for the actions of its supervising employees occurring in the United States. As has already been emphasized, the claim cannot survive against the Holy See itself for its own failures to warn or report because such tortious conduct would have occurred abroad.

4) **Tort of Outrage/Infliction of Emotional Distress** (Class I Claim V, Class II Claim IV): Plaintiffs plead this claim against the Holy See itself, stating:

> The acts and omissions of the Defendant, Holy See alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities . . . is conduct which is so outrageous and extreme in degree, as to go beyond all possible bounds of decency, so as to be regarded as utterly atrocious in a civilized society.

This claim cannot survive against the Holy See as it pertains to the actual promulgation of the 1962 Policy because the promulgation itself occurred abroad. In addition, it cannot survive against the Holy See for the conduct of its allegedly abusive priests because the acts of alleged abuse did not occur within the scope of employment. In contrast, this claim does survive against the Holy See as it pertains to the conduct of its employees who, pursuant to the 1962 Policy, violated the terms of the relevant international laws through their tortious supervisory conduct over the allegedly abusive clergy.[14]

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[14] It also appears that the plaintiffs have abandoned this claim by stating in their response to the Holy See's motion to dismiss "[t]he Plaintiffs' complaint also identifies claims for intentional infliction of emotional distress . . . . Plaintiffs are no longer pursuing those claims." (Plaintiffs' Response to the Holy See's Motion to Dismiss at 6 n.9).

We next turn to considering whether the surviving theories of liability, as outlined above, are precluded by the other exception to the tortious act exception: whether they arise out of misrepresentation or deceit.

In contrast to *Cabiri* and *Kozorowski*, plaintiffs' claims are not best characterized as stemming directly from the misinformation disseminated by the Holy See. Instead, plaintiffs' claims are more akin to claims of negligent supervision as employees of the Holy See are alleged to have provided inadequate supervision over those under its care. In this way, these claims resemble other negligent supervision claims more than they resemble claims brought by the plaintiffs in *Cabiri* and *Kozorowski*. *See, e.g.*, *Williams v. Ky. Dep't of Educ.*, 113 S.W.3d 145, 148 (Ky. 2003) (addressing claims of negligent supervision on the part of high school faculty which resulted in the death of a student and noting that "[i]t is well established in this jurisdiction that a school teacher can be held liable for injuries caused by negligent supervision of his/her students"); *see also Yanero v. Davis*, 65 S.W.3d 510, 528-31 (Ky. 2001); *Nelson v. Turner*, No. 2007-CA–000489-MR, 2008 Ky. App. LEXIS 177 (Ky. Ct. App. June 6, 2008). We therefore conclude that, at this stage of the litigation, the plaintiffs' claims of violation of customary international law of human rights, negligence, and breach of fiduciary duty should not be dismissed for "arising out of . . . misrepresentation [or] deceit." *See* 28 U.S.C. § 1605(a)(5)(B). We do however dismiss the last two claims advanced by plaintiffs in their complaint (Class I Claims VI and VII, Class II

Claims V and VI) as they do arise out of misrepresentation or deceit.[15]

In conclusion, we also note that we believe the foregoing analysis to be consistent with the analysis of the district court in *O'Bryan II*.

VII.

For the foregoing reasons, we affirm the district court's partial grant of defendant's motion to dismiss.

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[15] In addition, plaintiffs' complaint states that it pursues these claims against the Holy See "in its capacity as an Unincorporated Association and Head of an International Religious Organization Only." As a result, because we have determined above that the Holy See cannot be sued in such a capacity, these claims would appear to no longer be relevant. Moreover, plaintiffs admit as much in their Response to the Holy See's motion to dismiss. Plaintiffs' Response to the Holy See's Motion to Dismiss at 6 n.9 (stating that "the complaint alleges claims for deceit . . . and misrepresentation . . . . Those latter causes of action were expressly brought against the Defendant only in its capacity as an unincorporated association and head of an international religious organization. In light of the [district] Court's previous ruling that such capacity does not apply here, those claims are no longer at issue).

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**No. 3:04CV-338-H**

**[Filed January 10, 2007]**

JAMES H. O'BRYAN et. al. )
PLAINTIFFS )
)
V. )
)
HOLY SEE )
DEFENDANT )
)

## MEMORANDUM OPINION

Plaintiffs James O'Bryan, Donald Poppe, and Michael Turner ("Plaintiffs") filed this putative class action against the Holy See ("Defendant") in its Capacity as a foreign state and in its capacity as an unincorporated association and head of an international religious organization, alleging claims for liability under the doctrines of *respondeat superior* for acts of bishops and priests, violations of customary international law of human rights, negligence, breach of fiduciary duty, infliction of emotional distress, deceit, and misrepresentation. Plaintiffs' claims arise

from sexual abuse by local Catholic priests many years ago. They seek monetary and injunctive relief.

This Court has previously ruled that the Holy See is considered a foreign state, and, therefore the Foreign Sovereign Immunity Act ("FSIA") governs any claims against it. Defendant now challenges the Court's subject matter jurisdiction under FSIA. Applying FSIA and its various exceptions present a number of novel, complex, and intertwined questions. The Court ultimately concludes that some of Plaintiffs' claims premised upon the acts and omissions of Holy See officials and employees within the United States fit within the federal court jurisdiction under FSIA.

## I.

Plaintiffs' factual and legal allegations are critical to the subsequent FSIA analysis. Their central thrust is that the "root [of the childhood sexual abuse] problem" is "the deliberate failure of the Holy See to take effective action to prevent childhood sexual abuse by its priests, clerics, bishops, archbishops, cardinals, agents, and employees." Plaintiffs say that the Holy See imposed a policy of secrecy surrounding incidents of childhood sexual abuse and failed to take steps to prevent abuse, punish offenders, or avoid recidivism by prior offenders. Plaintiffs make four specific allegations.

Plaintiffs allege first that the Holy See violated its international law obligations under the Universal Declaration of Human Rights and the Convention on the Rights of the Child. Second, Plaintiffs allege that Defendant, "by and through its agents, servants and employees," breached duties owed to Plaintiffs. Those

duties included the duty to provide safe care, custody, and control to the minor children entrusted to Roman Catholic; the duty to warn parents of those children that the priests and other clerics to whom they entrusted their children were known perpetrators of childhood sexual abuse; and the duty to report known or suspected perpetrators of childhood sexual abuse to the appropriate authorities. Third, Plaintiffs allege that the Holy See breached fiduciary duties owed to Plaintiffs, including but not limited the duty to warn parents of children placed in the care, custody, and control of known perpetrators of childhood sexual abuse and the duty to report known or suspected perpetrators of child sexual abuse to the appropriate authorities. Fourth, Plaintiffs allege that Defendant's conduct constitutes an outrage and infliction of emotional distress. Fifth and sixth, in claims solely against the Holy See in its capacity as an incorporated association and head of an international religious organization, Plaintiffs allege torts of deceit and misrepresentation. Plaintiffs also seek a variety of injunctive relief.

Plaintiffs actually represent two classes of persons. Class One consists of those who *have not* previously brought claims for childhood sexual abuse against a diocese, archdiocese, or other Roman Catholic body. Class Two consists of those who *have* previously brought such claims and who have released that body from further liability. With one exception, the claims of the two classes are identical. Only the Class One Plaintiffs seek to hold the Holy See responsible under the doctrine of *respondeat superior* for the conduct of its "agents, servants, employees, and ostensible agents" in the United States.

## II.

For most of our nation's history, it was our national policy to grant foreign states complete immunity from civil suits in United States courts. Beginning in 1952, this view began to change. Gradually, a view evolved that one could sue foreign states in United States courts under certain limited exceptions. The specific determinations were generally left to the State Department until 1976 when Congress enacted FSIA, which sought to codify the existing exceptions. Now, FSIA provides the sole basis for obtaining jurisdiction over a foreign state in United States courts. *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 434 (1989).

Under FSIA, foreign sovereigns are presumptively immune from the jurisdiction of the United States courts. *See* 28 U.S.C. § 1604; *Byrd v. Corporacion Forestal Y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). To assert subject matter jurisdiction over a foreign sovereign, a court must meet one of FSIA's exceptions. *See* 28 U.S.C. § 1330(a); *see also* 28 U.S.C. § 1605. Plaintiffs have alleged that several exceptions to the FSIA apply: the waiver exception, the commercial activity exception, and the tortious conduct exception. *See* Complaint at 4-7. The first two are relatively straightforward and the Court discusses each in this Section. The tortious conduct exception requires a more lengthy discussion found in Section III.

### A.

Plaintiffs assert that the Holy See waived its FSIA immunity either "implicitly or explicitly" by "among

other things" failing to raise a waiver defense over decades of settling and acquiescing in settlements of childhood sexual abuse claims. *See* Complaint at 6. The Court finds no evidence that it has done so in this suit. Indeed, the Holy See has vigorously advocated its immunity throughout tnis litigation.

Furthermore, under established law, Defendant has not implicitly waived immunity under FSIA. The implied waiver exception "must be construed narrowly." *See, e.g.*, *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 243 (2d Cir. 1997). Generally, implied waiver of immunity under FSIA is found under only three circumstances:

> (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.

*In re Republic of Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002). None of the circumstances discussed by the Ninth Circuit seems to apply here. Plaintiffs have not pled that Defendant has agreed to arbitration, that Defendant has agreed that "a contract is governed by the law of a particular country," or that Defendant has filed a pleading in this case without raising the defense of sovereign immunity. Therefore, the Court concludes that Plaintiff cannot meet the waiver exception to FSIA.

B.

Plaintiffs also argue that the Holy See is liable under FSIA's commercial activity exception. The commercial activity exception contains three clauses, any one of which satisfies the exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). A "commercial activity" means "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). Judge Michael Mosman of the United States District Court of the District of Oregon has authored a scholarly and exhaustively researched opinion examining the Holy See's liability under the commercial activity exception. *See Doe v. Holy See*, 434 F.Supp.2d 925 (D.Or. 2006). This Court generally endorses Judge Mosman's reasoning. There are two distinctions, however, between this case and *Doe*. First, the claim in *Doe* was related to the alleged tortious conduct of one priest; in this case, the claim encompasses a much broader range of alleged activities. Second, the plaintiff in the *Doe* case sought liability against the Holy See under only the first and

third clauses of the commercial activity exception; Plaintiff here seeks liability via all three clauses.

Like the court in *Doe*, however, the Court here concludes that the "true essence" of the claim here is not commercial. *Id.* at 942 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993)). Plaintiffs' claims "clearly sounding in tort" and their complaint does not alleged "property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial." *Doe*, 434 F.Supp. 2d at 942. Because the complaint fails to allege activities that are commercial in nature, the commercial activity exception does not apply.[1]

**III.**

Section 1605(a) of the FSIA also provides an exception to foreign sovereign immunity for tortious acts of a foreign state or its agents. The tort exception provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise encompassed [by the commercial activity exception], in which money damages are sought against a foreign state for personal injury or

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[1] No further discussion of the three prongs of the commercial activity exception is necessary because "the overarching principle explained in *Nelson* requires [the Court] to hold the activities alleged in this complaint are not commercial . . . ." *Id.* at 947.

> death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1605(a)(5). A related subpart provides that the tort exception itself shall not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A). The Court will discuss this "exception to the exception" in Section IV.

First, however, the Court must answer a number of questions to determine whether the tortious activity exception even applies. Does FSIA's geographic limitation restrict any claims in this case? Are the individual actors actually officials or employees of the Holy See as the tortious activity exception requires? And, if so, were those officials acting within the scope of their employment. The Court will address each question in turn.

A.

No one disputes that the tortious activity exception is restricted to cases in which the personal injury, death, or damage to or loss of property occurs in the United States. 28 U.S.C. § 1605(a)(5). The actual personal injuries complained of in this suit – the sexual abuse of Plaintiffs and purported Class Members – meet that requirement. However, the analysis does not end here. The Seventh and D.C. Circuits have added the requirement that the tortious

act or omission (in addition to the actual personal injury) must occur in the United States. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984).[2] The Ninth Circuit has a slightly different rule, holding that "if plaintiffs allege *at least one entire tort* occurring in the United States, they may claim under § 1605(a)(5)." *Olsen v. Government of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984) (emphasis added). The Sixth Circuit has not considered this additional requirement.

Subsequently, Chief Justice Rehnquist, speaking for a unanimous Supreme Court, discussed the issue in *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra*. The Court did hold that § 1605(a)(5) is "limited by its terms . . . to those cases in which the damage to or loss of property occurs *in the United States*." *Id.* at 439 (emphasis in original). The Court then concluded that "[b]ecause respondents' *injury* unquestionably occurred well outside [the United States], the exception for noncommercial torts cannot apply." *Id.* at 441 (emphasis added). The Court then discussed the fact that a tort may have had effects in the United States, drawing a distinction between § 1605(a)(5) and § 1605(a)(2), under which a foreign state may be liable for commercial activities "outside the territory of the United States" that have a "direct effect" inside the United States. 28 U.S.C. § 1605(a)(2). It said that "Congress' decision to use explicit language

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[2] The continued viability of the D.C. Circuit decision in *Asociacion de Reclamantes* is in some doubt. *See Burnett v. Al Baraka Investment and Development Corp.*, 292 F.Supp.2d 9, 19 n.4 (D.D.C. 2003).

in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441. While the Supreme Court's conclusions are not completely clear, its language suggests a view that both the injury and the tortious act or omission must occur in the United States. This is strong enough language for this Court to adopt the same view.

Here, Plaintiffs allege torts that occurred both outside and inside the United States. Plaintiffs concede that the *acts* of *Defendant itself* were all "committed outside the United States." *See* Plaintiffs' Response Brief at 27. Moreover, any omissions committed by the Holy See itself clearly occurred outside of the United States. Therefore, under FSIA's territorial requirements, the Holy See cannot be held liable for "its own" alleged torts (as opposed to those committed by its officials or employees), because those alleged torts all occurred outside of the United States. Holding otherwise would constitute a dramatic expansion of FSIA.

On the other hand, Plaintiffs allege that acts and omissions by agents of the Holy See inside the United States caused personal injuries. Specifically, Plaintiffs allege that Defendant's agents, officials, and employees failed to report known or suspected child abuse, failed to warn parishioners about known or suspected pedophiles in child-care positions, failed to provide adequate care to children entrusted to its churches and school, failed to maintain the premises of churches and schools in a reasonably safe condition, and failed to adequately supervise or control known or suspected sexual predators. *Id.* at 17. These torts –

both acts and omissions – alleged to have been committed by the "Defendant's agents, officials, and employees" *in the United States* all certainly occurred within the United States, and thus squarely fall under the tortious activity exception of FSIA.

**B.**

The critical question then becomes whether the agents discussed above – the United States-based archbishops, bishops, and other clergy of the Roman Catholic Church – are officials or employees of the Holy See as defined in FSIA. This is not an easy question to answer. FSIA allows actions against foreign sovereigns only where "money damages are sought against a foreign state for personal injury. . . occurring in the United States and caused by the tortious act or omission of that foreign state or of *any official or employee* of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5) (emphasis added).

The FSIA provides no definition of "official" or "employee." Whether the American Catholic archbishops, bishops, and other clergy are employees of the Holy See would appear to be a question of Kentucky state law. *See, e.g.*, *Randolph v. Budget Rent-A-Car*, 87 F.3d 319, 325 (9th Cir. 1996) (holding that the "question of whether Maghrabi was a Saudia employee is governed by California law"). *See also First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") ("where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances"). "Under Kentucky law the right to

control is considered to be the most critical element in determining whether an agency relationship exists." *Grant v. Bill Walker Pontiac-GMC, Inc.*, 523 F.2d 1301, 1305 (6th Cir. 1975).

Under FSIA's burden-shifting structure, once a foreign state has made a prima facie showing of immunity, the plaintiff then bears the burden of coming forward with facts showing that one of the statutory exceptions to immunity applies. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994). However, once the *asserted allegations* brings claims within the statutory exceptions to FSIA, the burden then shifts to the party asserting immunity to prove that the exceptions do not apply. *See Siderman v. Republic of Argentina*, 965 F.2d 699, 707-08 (9th Cir. 1992). The ultimate burden of persuasion remains with the foreign sovereign at all times. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989).

Here, Plaintiffs have alleged that the Holy See exercises substantial control over the Catholic archbishops, bishops, and other clergy based in the United States. Specifically, they assert that the Holy See has "absolute and unqualified power and control . . . over each and every priest, bishops, brother, sister, parish, diocese, archdiocese, and instrumentality of the Church." *See* Complaint at 11. These asserted allegations are sufficient to state a prima facie case that the Holy See exercises substantial control over the archbishops, bishops, and other Catholic clergy in the United States. Therefore, the burden shifts to the Holy See to prove that the exception does not apply.

The Holy See has declined to provide such evidence at this time, and therefore the Court concludes at this time that the Holy See does exercise control substantial enough to justify a conclusion that those persons are "employees" of the Holy See for the purposes of FSIA.[3] However, facts may emerge during the litigation that allow the Holy See to meet its burden, and thus the Court is willing to reexamine its ruling on this issue at an appropriate time.

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[3] It is worth noting that the text of FSIA and accompanying case law does produce somewhat curious results in this analysis. Specifically, FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality is futher defined as an entity which is, among other charcteristics, "neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3). Under this definition, for instance, the Archdiocese of Louisville is certainly not an "agency or instrumentality" of a foreign state, because it is clearly a citizen of Kentucky, as it is organized as a Kentucky corporation. Therefore, while this Court concludes that, for instance, the Archbishop of Louisville is an "employee" of the Holy See for the purposes of Kentucky law, the entity over which he presides – the Archdiocese of Louisville – is not an agency or instrumentality of the Holy See. Although this result initially may seem incongruous, a hypothetical example may make it less so. Consider, for instance, a fully state-owned foreign bank which has an business entity incorporated in the United States and the president of that entity. Although that entity is not part of the foreign state under the definitions supplied by FSIA, the president of that entity may in fact still be effectively an employee of the foreign state, taking direction from the foreign government and following polices laid down by its leaders. That appears to be the case here.

C.

Even if the bishops and clergy of the Roman Catholic Church are ultimately deemed to be officials or employees of the Holy See, the Court must address a final issue: whether those employees or officials were acting within the scope of their office or employment when they engaged in the conduct alleged here. For conduct to be within the scope of employment, the conduct must be "of the same general nature as that authorized or incidental to the conduct authorized." *Wood v. Southeastern Greyhound Lines*, 194 S.W.2d 81, 83 (1946).

To be sure, under Kentucky law, a priest's sexual misconduct is outside the scope of employment and thus his employer cannot be held liable for that misconduct. *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000). Plaintiffs' claims, however, are more nuanced than those in *Osborne*. Plaintiffs allege that Defendant's agents in the United States, pursuant to directives from Defendant Holy See, committed various acts and omissions in covering up and otherwise failing to properly address the issue of childhood sexual abuse in the Catholic Church and its entities. Those policies, Plaintiffs allege, led to their injuries. If, as Plaintiffs allege, these bishops, archbishops, and other clergy followed a written or unwritten policy established by the Holy See, they certainly acted within the scope of their office or employment.

Plaintiffs' allegations seem to fit squarely within the *Wood* test: the negligent conduct asserted here is alleged to be not only "of the same general nature as that authorized," but in fact the actual authorized –

indeed, the allegedly mandated – conduct. Following the mandates of the Holy See is certainly conduct within the scope of the archbishops', bishops', and other clergy-members' employment. It is unclear whether Plaintiffs allege other acts or omissions that were not part of an alleged Holy See policy.

**D.**

In summary, the Court finds that the tortious activity exception does apply to claims arising from certain acts or omissions of archbishops, bishops and clergy of the Catholic Church that occurred inside the United States. At least to the extent these persons acted pursuant to a Holy See policy, these persons were acting within the scope of their employment. Subsequent evidence may require the Court to revisit these conclusions and refine the precise acts or omissions subject to jurisdiction under FSIA. However, the claims against the Holy See directly (i.e. as opposed to via its officials or employees) cannot be sustained because these actions or omissions occurred outside of the United States.

**IV.**

Having concluded that some of Plaintiffs' claims meet the tortious conduct exception to FSIA's general rule of immunity, the Court must now consider a final issue. This concerns "the exception within the exception." FSIA will not allow a tort claim, even against officials or employees of the Holy See whose acts and injuries occur in the United States where those officials were exercising their discretionary function. Called the discretionary function exception, it exempts claims "based upon the exercise or

performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a)(5)(A).

The discretionary function exception of the FSIA is modeled after the corresponding exception in the Federal Tort Claims Act ("FTCA") and is interpreted and applied consistent with FTCA law. *See, e.g., Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987). This exception appears based upon the policy view that foreign states should be immune from the consequences of discretionary acts of employees, even within the scope of their employment. Courts have found that both the FTCA and FSIA exceptions are intended to preserve immunity "for decisions grounded in social, economic, and political policy." *In re Terrorist Attacks of September 11, 2001*, 349 F.Supp.2d 765, 794 (S.D.N.Y. 2005) (internal citations and quotations omitted). Consequently, the discretionary function exception preserves immunity for planning-level decisions, as opposed to operational-level decisions. *Id.* (citations omitted).

Defendant must satisfy two elements to avail itself of FSIA immunity under the discretionary function exception. First, the challenged action must be discretionary; that is, it must involve "an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *United States v. Gaubert*, 499 U.S. 315, 322 (1991). In the FTCA context, this prong means that if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the discretionary function exception does not apply. *Berkovitz*, 486 U.S. at 536. Second, and even if the challenged action did involve

an element of judgment or choice, "a court must determine whether that judgment is of the kind the discretionary function exception was designed to shield." *Id.*; *Gaubert*, 499 U.S. at 322-23. The Supreme Court explained this prong in *Berkovitz* in the following manner:

> The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.

*Berkovitz*, 486 U.S. at 536 (internal citations omitted).

To answer the questions posted by the two *Berkovitz* elements, the Court must define Plaintiffs' negligence claims by their constituent elements. These claims can be distilled into three principal omissions, as laid out in the Complaint: that (1) Defendants failed to *provide safe care* to children entrusted to their care; that (2) Defendants *failed to warn* parishioners that their children would be under the care of known or suspected pedophiles; and that (3) Defendants *failed to report* known or suspected child abuse to the appropriate authorities . *See* Complaint at 26. For the reasons that follow, only the first group of claims meets the discretionary function test and are exempt from suit.

The first claim seems to be essentially a negligent hiring claim: that the Defendant hired persons whom

it knew or suspected were child sexual abusers and place them in positions where they could sexually abuse children. Applying the first prong of the *Berkovitz* test, such personnel decisions appear to involve a discretionary activity. Not surprisingly, courts have generally held that negligent hiring decisions are protected by the discretionary function exception. *See, e.g., United States v. Gaubert*, 499 U.S. 315, 332-34 (1991) (holding that claims involving management decisions, including the "negligent selection of directors and officers," were barred by the discretionary function exception); *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) ("decisions relating to hiring . . . usually involve policy judgments of the type Congress intended the discretionary function to shield"). Although Defendant's hiring decisions may have indeed been negligent, the discretionary function exception to the FSIA protects such decisions. Therefore, Plaintiffs' negligence claim based upon the "duty to provide safe care, custody, and control" of minor children in Catholic schools and churches cannot proceed.

The second negligence claim is that Defendant failed to warn parishioners that their children would be under the care of known or suspected pedophiles, allegedly pursuant to a policy promulgated by the Holy See itself. Under the tests laid out in *Berkovitz* and *Gaubert*, the decision by the bishops, archbishops, and other clergy not to warn parishioners would appear to be a decision specifically prescribed by that policy. Therefore, their decisions do not satisfy the first prong of the *Berkovitz* test, because they did not involve "an element of judgment or choice." Therefore, the alleged failure of the Holy See's officials and employees to warn parishioners that their children would be under

the care of known or suspected pedophiles is not a decision protected by the discretionary function exception.

Finally, Plaintiffs' claim that Defendant's officials and employees failed to report known or suspected perpetrators of child sexual abuse to the relevant state and local authorities. Like the failure to warn claim, Plaintiffs claim that the Holy See's employees and officials failed to report child sexual abuse to the appropriate authorities pursuant to a policy promulgated by the Holy See. Again, as alleged, this decision did not involve an "an element of judgment or choice" because an established policy required the action. Thus, liability for such decision is not barred by the discretionary function exception.

## V.

Several matters remain for discussion. First, Defendant Holy See asserts that the First Amendment bars Plaintiffs' claims. This Court has previously ruled that this litigation applies only to the Defendant as a foreign state, not as the head of an international religious organization. Foreign sovereigns do not enjoy rights derived from the United States Constitution. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002) ("Never has the Supreme Court suggested that foreign nations enjoy rights derived from the Constitution, or that they can use such rights to shield themselves from adverse actions taken by the United States"). Defendant Holy See cannot simultaneously seek the protections of the FSIA and the United States Constitution. Therefore, the First Amendment does not bar Plaintiffs' claims.

Second, Defendant asserts that Plaintiff's claims should be dismissed for lack of standing because Plaintiffs' injuries are *not* fairly traceable to the conduct of Defendant. At this stage of the litigation, Defendant's assertion is merely a conclusory statement without legal or factual support. Therefore, standing does not bar Plaintiffs' claims.

Third, Defendant asserts that the doctrine of international comity bars Plaintiffs' claims. The FSIA represents the position of the United States government on the doctrine of international comity. The FSIA is an exercise of Congress' "undisputed power to decide, as a matter of federal law, *whether and under what circumstances* foreign nations should be amenable to suit in the United States." *Universal Consol. Companies, Inc. v. Bank of China,* 35 F.3d 243, 246 (6th Cir. 1994) (emphasis added). The FSIA represents Congress' determination as to "whether and how foreign states may be sued in American courts." *Id.* The doctrine of international comity is indeed an important one, but the FSIA is the proper framework for American courts to apply in cases where the doctrine is asserted. This Court has already addressed the FSIA, and thus any further discussion of the doctrine of international comity is unnecessary.

Fourth, Defendant asserts that the FSIA bars Plaintiff's fraud and misrepresentation claims. Defendant asserts this is the case based on the statutory language of the FSIA, which bars any claims under the FSIA "arising out of . . . misrepresentation [or] deceit." 28 U.S.C. § 1605(a)(5)(B). Fraud or misrepresentation claims *may* be made under the commercial activity exception. *See, e.g., Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982).

However, this Court has already determined that the commercial activity exception does not apply, and thus the language of section 1605(a)(5)(B) applies here. Thus, the plain language of FSIA bars Plaintiffs' misrepresentation and fraud claims. Plaintiffs have acknowledged as much, both in their Complaint and in their response to Defendant's motion to dismiss. *See* Plaintiffs' Response at 6 n.9 (stating that the fraud and misrepresentation claims "are no longer at issue"). Therefore, those counts are dismissed at this time.

Fifth, Defendant asserts in passing that Plaintiffs' international law claims must fail because (1) neither the Universal Declaration on Human Rights nor the Convention on the Rights of the Child creates a private right of action and (2) the Plaintiffs have failed to exhaust local remedies. *See* Defendant's Reply Brief at 7; Defendant's Response Brief at 33. Considering the former argument was brought only in the Reply Brief, this issue is not fully briefed. The Court will not consider it at this time.

## VI.

In summary, this Court will dismiss the Plaintiffs' negligence claim that Defendant Holy See failed to provide safe care of children entrusted to the clergy. The Court also will dismiss Plaintiffs' deceit and misrepresentation claims. However, the Court will deny Defendant's motion to dismiss as to the failure to report and failure to warn negligence claims and as to all other claims asserted against the Holy See at this time. Therefore, the following claims remain against the Holy See: negligent failure to report, negligent failure to warn, breach of fiduciary duty (insofar as that breach involved the failure to report and the

failure to warn), outrage and emotional distress, violations of the customary law of human rights, and claims under the doctrine of *respondeat superior*. The Court is open to reconsidering its decision that the United States-based bishops, archbishops, and other clergy of the Roman Catholic Church are employees of the Holy See for purposes of FSIA if further contrary evidence emerges during the litigation.

The Court will enter an order consistent with this Memorandum Opinion.

January 10, 2007

/s/ John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Judge

cc: Counsel of Record

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**No. 3:04CV-338-H**

**[January 10, 2007]**

JAMES H. O'BRYAN et. al. )
PLAINTIFFS )
)
V. )
)
HOLY SEE )
DEFENDANT )
)

**ORDER**

The Court has issued a Memorandum Opinion addressing whether the Holy See is immune from jurisdiction under FSIA as to any parts of Plaintiffs' complaint. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to dismiss is SUSTAINED as to Plaintiffs' negligence claim of failure to provide safe care and custody of children and their claims of deceit and misrepresentation.

IT IS FURTHER ORDERED that the Court denies all other parts of Plaintiffs' motion and the following claims remain:

(1) Negligent failure to report childhood sexual abuse to the appropriate authorities

(2) Negligent failure to warn parents of children placed in the care, custody, and control of known or suspected perpetrators of childhood sexual abuse

(3) Breach of fiduciary duty, to the extent that this claim involves the failure to warn and failure to notify claims outlined in (1) and (2), above

(4) Violations of the customary international law of human rights

(5) Outrage and intentional infliction of emotional distress

(6) Claims for liability under *respondeat* superior for acts of bishops and priests, only as to the Class One Plaintiffs in this putative class action.

IT IS FURTHER ORDERED that the parties should enter into an agreed litigation schedule. Please notify the Court should a further conference be helpful on this or for any other purpose.

This is not a final order.

January 10, 2007

/s/ John G. Heyburn II
John G. Heyburn II
Chief Judge, U.S. District Judge

cc: Counsel of Record

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**CIVIL ACTION NO. 3:04CV-338-H**

**[Filed October 7, 2005]**

JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER, Individually and on Behalf of All Similarly Situated Persons
PLAINTIFFS

v.

HOLY SEE, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization
DEFENDANT

## MEMORANDUM OPINION

Plaintiffs James O'Bryan, Donald Poppe, and Michael Turner ("Plaintiffs") filed this putative class action against the Holy See ("Defendant") in its Capacity as a foreign state and in its capacity as an unincorporated association and head of an international religious organization, alleging claims for liability under the doctrines of *respondeat superior*,

violation of customary international law of human rights, negligence, breach of fiduciary duty, infliction of emotional distress, deceit, and misrepresentation. Their claims arise from allegations of sexual abuse by local Catholic priests many years ago. Plaintiffs seek monetary and injunctive relief.

Defendant has moved to dismiss on the grounds of insufficient service of process, insufficient process, lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. Pursuant to the Court's order of May 27, 2005, the Court will consider Defendant's motion to dismiss for insufficient service of process before addressing the remainder of Defendant's motions.

I.

Plaintiffs attempted service of process on Defendant in three ways. Plaintiffs first attempted to serve Defendant under 28 U.S.C. § 1608(a)(3). On August 24, 2004, the Clerk of this Court sent a copy of the summons, complaint, and notice of suit, and a Latin translation of each via DHL Worldwide Express with delivery notification, addressed in the following manner:

| | |
|---|---|
| Company Name: | Secretariat of State |
| Contact Name: | Head of the Secretariat of State |
| Delivery Address: | Section for Relations with States, Apostolic Palace |

| | |
|---|---|
| Country: | Vatican City State |
| Post/ZIP Code: | 00120. |

In five attempts, DHL was unable to deliver the documents. Plaintiffs next attempted service under 28 U.S.C. § 1608(a)(4). On November 3, 2004, the Clerk of this Court sent two copies of the summons and complaint and notice of suit, and a Latin translation of each via DHL Worldwide Express with delivery notification, addressed to the Director of Special Consular Services, U.S. Department of State, Washington D.C. The State Department transmitted a letter to the Clerk of this Court that included a certified copy of the diplomatic note it included with Plaintiffs' materials. The note indicated that Plaintiffs' documents were transmitted to Defendant on December 13, 2004. Plaintiffs' third attempt at service was pursuant to the Kentucky long-arm statute, KRS § 454.210, under which the Kentucky Secretary of State sends, via certified mail with return receipt requested and bearing the return address of the Secretary of State, a copy of the summons and complaint to the defendant at the address listed in the complaint. The Secretary of State's return of service indicates that service was effected on June 18, 2004.

II.

The threshold question is whether Defendant is a foreign state within the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608 *et seq*. The United States government has recognized the Holy See as a foreign sovereign since January 10, 1984. *See, e.g., Americans United for Separation of*

*Church and State v. Reagan*, 786 F.2d 194, 197 (3d Cir. 1986), *Dale v. Colagiovanni*, 337 F. Supp. 2d 825 (S.D. Miss. 2004) (there is no dispute as to whether the Vatican is a foreign state under the FSIA); *English v. Thorne*, 676 F. Supp. 761, 764 (S.D. Miss. 1987) (Vatican is a foreign state). It is well established that such decisions are nonjusticiable. *See Americans United*, 786 F.2d at 201-202 ("It has long been settled that the President's resolution of such questions constitutes a judicially unreviewable political decision . . ."). The Sixth Circuit has also recognized the nonjusticiability of the determination of an entity's status as a foreign sovereign. In *United States v. Newman*, 899 F.2d 88, 96-97 (6th Cir. 1989), it said that the determination of whether an issue presents a nonjusticiable political question is "grounded on a respect for the separation of powers and a corollary concern that courts not engage in the brand of policy evaluation traditionally reserved to other branches of government." *Newman*, 899 F.2d at 96-97 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Plaintiffs make two arguments against the application of the FSIA to their claims. First, they argue that an entity's sovereign status must be determined as of the time the conduct in question occurred, and second, that the Court may determine that the Holy See has a separate capacity as a church, and is therefore *not* a foreign sovereign for purposes of the FSIA in this separate capacity (thereby obviating the need for service in accordance with the provisions of the FSIA). For the following reasons, the Court finds neither argument persuasive.

An Executive Branch decision to recognize an entity as a foreign sovereign applies retroactively and

"validates all the actions and conduct of the government so recognized from the commencement of its existence." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417 (1964) ("established rule" is that "recognition operates retroactively to validate past acts"); *United States v. Pink*, 315 U.S. 203, 233 (1942) (recognition is retroactive in effect); *United States v. Belmont*, 301 US 324, 328-330 (1937) (recognition is retroactive). Further, the FSIA itself is retroactive in application and applies to actions of foreign sovereigns prior to the passage of the FSIA. *Republic of Austria v. Altmann*, 541 U.S. 677, (2004) (holding that the FSIA applied retroactively to actions of the Austrian government in 1948). Consequently, the FSIA would apply to all actions of the Holy See from the time of its commencement.

Plaintiffs cite no authority for the proposition that the Holy See may be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization. They can point to no instance in which *any* sovereign's status has been disregarded on these grounds. Indeed, to do so would entirely defeat the purpose of the FSIA. As Defendant rightly notes, under Plaintiffs' argument, potential claimants would be permitted to skirt the requirements of the FSIA merely by claiming that a sovereign was not acting as a sovereign in the "context" of a particular case, but rather was acting in some other "capacity." Such a rule would significantly undermine the uniformity that Congress expressly intended. *See Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000) ("Congress enacted the FSIA in part to create a uniform body of law by establishing federal courts as the preferred forum for cases involving

foreign states."); *see also* H.R. REP. NO. 94-1487 (1976) at 32 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts."). In light of the FSIA's goal of "encouraging foreign states and their instrumentalities to appear before United States courts and allowing the merits of cases involving foreign sovereigns to be considered completely and carefully," *Amernational Indus., Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 976 (6th Cir. 1991), the Court will consider Plaintiffs' claims against Defendant only under the provisions of the FSIA.[4]

III.

As a foreign state, service in accordance with the provisions of the FSIA is the sole means of obtaining jurisdiction over the Holy See. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("[t]he Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"); *Republic of Argentina v. Weltover*, 504 U.S. 607, 610 (1992) (FSIA establishes a "comprehensive framework for determining whether a court . . . may exercise jurisdiction over a foreign

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[4] It is worth noting that the Holy See's sovereign status does not guarantee its immunity from suit – that determination is made under 28 U.S.C. § 1605 on an individual basis.

state." The Sixth Circuit acknowledged the comprehensive nature of the FSIA in *Universal Consolidated Cos. v. Bank of China*, 35 F.3d 243, 245 (6th Cir. 1994), where it held "by making § 1330 [of the FSIA] the sole basis for jurisdiction over a foreign state, regardless of the nature of the action, Congress has provided that it is precisely the sovereign status of the defendant which determines the method in which the defendant may be sued."

Section 1330(b) of the FSIA provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." Service of process on a foreign state must be effected in strict compliance with the provisions of section 1608(a).[5] *See, e.g.*, *Magness v. Russian Federation*, 247 F.3d 609, 611-613 (5th Cir. 2001) (the "provisions for service under section 1608 are hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute."). Sections 1608(a)(1) and (2) provide for service pursuant to a "special arrangement for service between the plaintiff and the foreign state" or an "applicable international convention on the service of judicial documents," respectively. Neither provision is applicable here. Accordingly, Plaintiffs must serve Defendant in accordance with section 1608(a)(3), which requires service by

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[5] In contrast, the Sixth Circuit and most other circuits have held that service on an "agency or instrumentality" under § 1608(b) is subject to a substantial compliance standard. *See, e.g.*, *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir. 1993). Section 1608(b) is inapplicable here.

> sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1608(a)(3). Plaintiffs bear the burden of showing validity of service. *Youn v. Track, Inc.*, 324 F.3d 409, 417 (6th Cir. 2003) (burden of proving personal jurisdiction rests on the party seeking to invoke the court's jurisdiction); *see also Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887-88 (6th Cir. 2002) (same). Plaintiffs must make more than just a "*prima facie* showing" of personal jurisdiction. *Neogen*, 282 F.3d at 887. Plaintiffs must establish personal jurisdiction by a preponderance of the evidence. *Serras v. First Tenn. Bank. Nat. Ass'n.*, 875 F.2d 1212, 1214 (6th Cir. 1989).

The parties disagree whether the package was properly addressed to reach the Holy See's Secretary of the Section for Relations with States (the equivalent of a foreign minister), Archbishop Giovanni Lajolo. The parties each submitted as an exhibit to their briefs the State Department profile of the Holy See,[6] which confirms that Archbishop Lajolo is the Holy See's equivalent of a foreign minister. According to the State Department profile, the Secretariat of State is part of the Roman Curia and the Secretary of State (the equivalent of a prime minister) is Cardinal Angelo

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[6] The profile is available at http://www.state.gov/r/pa/ei/bgn/3819.htm.

Sodano. The Section for Relations with States is a division of the Secretariat of State. Although Plaintiffs argue that the package was clearly addressed to the "Head of the Secretariat of State Section for Relations with States," the actual shipping label shows that the package was addressed to:

| | |
|---|---|
| Company Name: | Secretariat of State |
| Contact Name: | Head of the Secretariat of State |
| Delivery Address: | Section for Relations with States, Apostolic Palace |
| Country: | Vatican City State |
| Post/ZIP Code: | 00120. |

It is not obvious that the package was properly addressed to reach Archbishop Lajolo, and case law is clear that Plaintiffs must *strictly* comply with the requirements of section 1608(a). Improperly addressed documents do not strictly comply with the FSIA. *See, e.g.*, *Magness*, 247 F.3d at 613 (service upon Russian prime minister rather than foreign minister, among other service problems, did not strictly comply with section 1608(a)(3)); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340 (9th Cir. 1993) (Service of a untranslated complaint upon the President of Mexico by registered mail did not comply with § 1608(a)); *Shen v. Japan Airlines*, 918 F. Supp. 686, 691-692 (S.D.N.Y. 1994) (service upon "Japan Dept. Of Justice, Immigration Bureau," rather than to "head of the ministry of foreign affairs" did not strictly comply with § 1608(a)(3)); *Transaero, Inc. v. La Fuerza Aerea*

*Boliviana*, 30 F.3d 148, 153-54 (C.A.D.C. 1994) (service upon Bolivian Ambassador and Consul General in Washington, and Bolivian First Minister and Bolivian Air Force in La Paz did not strictly comply with § 1608(a)(3)); *Magnus Electronics, Inc. v. Royal Bank of Canada*, 620 F. Supp. 387 (N.D. Ill. 1985) (delivery of complaint to Argentine foreign minister by Argentine notary did not strictly comply with requirements of § 1608(a)(3)).

The requirement of strict compliance is particularly important here. That compliance is admittedly difficult and is made more so by the absence of any accommodation from the Holy See. The Court finds that Plaintiffs did not satisfy the requirements of section 1608(a)(3) because the documents were not served on the Holy See's foreign minister (the Secretary of the Section for Relations with States), Archbishop Lajolo. As it was addressed, the package appeared to be intended for the "Head of the Secretariat of State," Angelo Cardinal Sodano. Plaintiffs are not permitted to attempt service under section 1608(a)(4) until they have properly attempted service under section 1608(a)(3). Accordingly, Plaintiffs have not effected service upon the Holy See as required, and the Court lacks personal jurisdiction in this matter.

Such a defect is readily curable, however. Plaintiffs have made good faith attempts to perfect service under section 1608(a). Consequently, the Court will allow Plaintiffs an additional 60 days within which to perfect service. *See Finmar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114 (S.D.N.Y. 1995) (court permitted plaintiff additional time to perfect service under FSIA where petitioner had taken substantial

steps toward full compliance); *Lucchino v. Brazil*, 631 F. Supp 821 (E.D. Pa. 1986) (allowing plaintiff additional time to perfect service under FSIA), *Magnus Electronics, Inc. v. Royal Bank of Canada*, 620 F. Supp. 387 (N.D. Ill. 1985) (court permitted plaintiff to cure defective service within a reasonable time); *Resource Dynamics Int'l, Ltd. v. Gen. People's Comm.*, 593 F. Supp. 572 (N.D. Ga. 1984) (court allowed plaintiff additional time to perfect service under FSIA).

IV.

Defendant also challenges the adequacy of Plaintiffs' notice of suit and the Latin translations of the summons, complaint, and notice of suit. As the Court has already determined that service was inadequate under section 1608(a)(3) because the documents were improperly addressed, it need not address the adequacy of the notice of suit and the Latin translations. However, in the interest of judicial efficiency, the Court has examined both the notice of suit and the competing declarations addressing the adequacy of the Latin translations of the complaint, summons, and notice of suit. The Court finds no significant problem with the content of the notice of suit, as it provides the basic information required by the letter of section 1608(a) and 22 C.F.R. § 93.2. Defendant's demand for detailed, treatise-like explanations of various court documents and legal terms is unreasonable.

As for the adequacy of the Latin translations of the summons, complaint, and notice of suit, the declarations of the parties' experts are diametrically opposed on this point. The Court finds that although

strict compliance is the rule under section 1608(a), the translation into Latin need not be perfect. An apt reference is Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires only that the complaint make a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). As the court noted in *Baxter v. Rose*, 305 F.3d 486, 490 (6th Cir. 2002), "in the case of a truly unclear complaint, the defendant can move for a more definite statement of the claim under Rule 12(e)." Assuming Plaintiffs properly serve Defendant within the allotted time, Defendant may seek such a clarification if it is still unclear as to the nature of Plaintiffs' claims.

The Court will enter an order consistent with this Memorandum Opinion.

/s/
John G. Heyburn II
Chief Judge, U.S. District Court

October 6, 2005

cc: Counsel of Record

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**CIVIL ACTION NO. 3:04CV-338-H**

**[Filed October 7, 2005]**

JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER, Individually and on Behalf of All Similarly Situated Persons
PLAINTIFFS

v.

HOLY SEE, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization
DEFENDANT

## ORDER

Defendant, Holy See, has moved to dismiss Plaintiffs' claims on the grounds of insufficient service of process, insufficient process, and lack of personal jurisdiction. The Court has issued a Memorandum Opinion discussing its views. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to dismiss Plaintiffs' claims is DENIED.

IT IS FURTHER ORDERED that Plaintiffs may attempt to serve Defendant in compliance with the

provisions of 28 U.S.C. § 1608(a)(3) and (4) within sixty (60) days from the issuance of this order.

/s/
John G. Heyburn II
Chief Judge, U.S. District Court

October 6, 2005

cc: Counsel of Record

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**Nos. 07-5078/07-5163**

**[Filed February 6, 2009]**

JAMES H. O'BRYAN, DONALD E. POPPE, MICHAEL J. TURNER, Individually and on behalf of all Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church

Plaintiffs - Appellees Cross-Appellants

v.

HOLY SEE, In its Capacity as a Foreign State (State of the Vatican City) and in its Capacity as an Unincorporated Association and Head of an International Religious Organization

Defendant - Appellant Cross-Appellee

## ORDER

BEFORE: MARTIN, GIBBONS, and GRIFFIN, Circuit Judges.

Upon consideration of appellees cross-appellants' James H. O'Bryan, Donald E. Poppe and Michael J. Turner's motion for leave to reply to appellant cross-appellee Holy See's answer to the petition for rehearing,

And further considering the petition for rehearing filed by appellees cross-appellants James H. O'Bryan, Donald E. Poppe and Michael J. Turner,

It is **ORDERED** that the motion and petition be, and they hereby are, **DENIED**.

**ENTERED BY ORDER OF THE COURT**
Leonard Green, Clerk

/s/ Leonard Green

Issued: February 06, 2009

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**CIVIL ACTION NO. 3:04CV-338-H**

**[Filed October 7, 2005]**

JAMES H. O'BRYAN, Individually and on Behalf of All Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church, and

DONALD E. POPPE, Individually and on Behalf of All Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church, and

MICHAEL J. TURNER, Individually and on Behalf of All Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church

PLAINTIFFS

vs.

HOLY SEE, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization )

DEFENDANT )

## CLASS ACTION COMPLAINT

**********

Come the Plaintiffs, individually and on behalf of all other similarly situated individuals, by counsel, and for their complaint against the Defendant, Holy See, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization (hereafter "Holy See"), state and allege as follows:

## INTRODUCTION

A tragic pattern of widespread childhood sexual abuse and cover up has been exposed within the Roman Catholic Church. Childhood sexual abuse perpetrated by Roman Catholic clergy and agents in the United States, with the knowledge of the Holy See, its bishops, archbishops, and cardinals, and the cover up of that abuse in the United States mandated by the Holy See, are in flagrant violation of the laws of the United States, the common law of the states, federal common law and customary international law, including treaties and conventions adopted and signed by the Holy See. These laws make childhood sexual

abuse a crime, impose duties to report known or suspected child abuse, require organizations and individuals to act in the best interests of children, and establish civil responsibility, all in an attempt to protect children from harm. It should come as no surprise that childhood sexual abuse is a violation of international human rights standards and conventions adopted by virtually all civilized nations.

The financial and emotional fallout from childhood sexual abuse committed by Roman Catholic clergy and agents, and the attendant cover up of that abuse within the United States, has had a devastating effect on the victims, their families, and the Church itself. In an effort to ensure the safety of American children in the future, and to provide compensation for the harm suffered by past victims, a number of legal claims have been brought and settled in the United States against local dioceses and archdioceses.

Unfortunately, however, these actions have not been directed at the root of the problem: the deliberate failure of the Holy See to take effective action to prevent childhood sexual abuse by its priests, clerics, bishops, archbishops, cardinals, agents, and employees. The Holy See has refused to require compliance with either the letter or the spirit of childhood sexual abuse laws in the United States, including those that require reporting of such abuse, or with international standards of human rights for the protection of children.

Instead, the Holy See has mandated that all allegations of childhood sexual abuse be kept under a cloak of complete secrecy, even if that secrecy violated state, federal, or international law. In March, 1962,

the Holy See privately circulated a document containing a set of procedural norms for dealing with the solicitation of sex in confession, clergy sex with minors, homosexual relations, and bestiality. This document–an official legislative text issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII–imposes the highest level of secrecy on the handling of clergy sexual abuse matters. It is a reflection and written manifestation of the longstanding policies and directives of the Holy See regarding clergy sexual abuse, and imposed the Church's most extreme level of secrecy not only on those who handled such cases, but also on the document itself. This secret document was first discovered and made public in July, 2003 by news media in the United States and throughout the world. The policies of the Holy See expressed in this and other documents require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even where such failure to report would itself be a criminal offense.

The Church's desire to protect itself from scandal has consistently outweighed any desire to protect the children brought into contact with its priests, clerics and agents. The directives from the Holy See carried out in the United States have meant that the overall financial burden for its conduct has been borne by society in general, and by the Church's faithful parishioners in particular.

This action is rooted in a substantial and persistent pattern of conduct by the Holy See within the United States which has resulted in massive injury in this country–to individual victims, their families, their

communities, and society as a whole. Sadly, this lawsuit is necessary for the protection of American children. Its sole purpose is to place blame and affix responsibility where it lies, and to bring closure to this tragic chapter in the life of the Roman Catholic Church in the United States.

## JURISDICTION, VENUE and SERVICE OF PROCESS

1. Insofar as the Defendant is a "foreign state" within the meaning of 28 U.S.C. § 1603, this Court has both personal and subject matter jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330, as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1604-1607 of that title, including particularly 28 U.S.C. §§ 1605(a)(1), 1605(a)(2), and 1605(a)(5), which provide general conditions for non-immunity of a foreign state for any case:

- in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; or

- in which the action is based upon a commercial activity carried on in the United States by the foreign state; or

- in which the action is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or

- in which the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; or

- not otherwise encompassed above, in which money damages are sought against a foreign state for personal injury occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

2. Insofar as the Defendant is a "foreign state" within the meaning of 28 U.S.C. § 1603, claims pursued herein are based upon a commercial activity carried on in the United States by the Defendant; acts performed in the United States in connection with a commercial activity of the Defendant elsewhere; and/or upon acts outside the territory of the United States in connection with a commercial activity of the Defendant elsewhere that caused a direct effect in the United States. The commercial activities of the Defendant encompass both a regular course of commercial conduct, including but not limited to fundraising activities, and particular commercial transactions or acts. Such activities carried on by the Defendant have substantial contact with the United States, including acts performed in the United States, funds raised from United States persons and sources and sent to the Defendant from organs, agencies and instrumentalities in the United States, explicit and implicit policy directives from the Defendant sent to its agents in the United States, and substantial consequences for

persons within the United States resulting from the Defendant's actions.

3. Insofar as the Defendant is a "foreign state" within the meaning of 28 U.S.C. § 1603, claims pursued herein, not otherwise encompassed above, seek money damages from Defendant for personal injury occurring in the United States and caused by the tortious acts or omissions of the Defendant or of any official or employee of the Defendant while acting within the scope of their office or employment within the United States. Such acts within the United States include the negligent direction and control of the Defendant's agents, organs, agencies or instrumentalities in the United States, as effectuated within the United States and resulting in a pattern of serious personal injury in the United States. The failure of the Defendant to control its agents, organs, agencies or instrumentalities in the United States as set out in this Complaint constitute a breach of mandatory obligations under United States and international law and is in any event not a discretionary function of the Defendant or its agents under United States or international law. Nor do these claims against the Defendant, Holy See, in its capacity a "foreign state," arise out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, but rather arise out of the doctrine of respondeat superior, violations of customary international law, negligence, breach of fiduciary duty, and infliction of emotional distress.

Under no circumstances can the conduct of the Defendant, Holy See, including longstanding directives and refusal to comply with the criminal statutes of the

various United States, mandating the reporting of childhood sexual abuse, be considered a "discretionary act or function." Further, the act of agents of the Defendant, Holy See, in covering up known criminal acts of childhood sexual abuse by its agents amounts to criminal conduct in the nature of aiding and abetting or criminal complicity of the crime of childhood sexual abuse, reckless endangerment, and obstruction of justice.

4. Insofar as the Defendant is a "foreign state" within the meaning of 28 U.S.C. § 1603, claims pursued herein, not otherwise encompassed above, also seek money damages from the Defendant, Holy See, for personal injury occurring in the United States and caused by, among other things:

- the tortious acts of the Defendant's agents, employees, organs, agencies or instrumentalities acting in the United States for which the Defendant is liable under recognized principles of respondeat superior and vicarious liability; and/or

- tortious acts and negligence of the Defendant and its agents in the United States in selecting, supervising, or otherwise controlling or failing to control its agents in the United States. Such acts of selecting, supervising and otherwise controlling or failing to control its agents and the negligence of its agents, as well as the resulting harm, occurred in the United States; and/or

- the tortious acts and negligence of the Defendant with respect to duties owed to Plaintiffs under United States law, duties which it breached by its actions and patterns of action and inaction in the United States, including its prescription, enforcement and non-enforcement, and dissemination by managerial agents of Defendant, of directives and guidelines to be followed in the United States; and/or

- the tortious acts of the agents of the Defendant acting with the apparent authority of the Defendant and/or the negligence of the Defendant in enabling its agents to conceal their commission of tortious acts. Said apparent authority and/or opportunity for concealment arises from an agency relationship occurring in the United States, in addition to the injury occurring in the United States.

Such claims are not based on discretionary functions under United States or international law. Nor do these claims against the Defendant, Holy See, in its capacity a "foreign state," arise out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, but rather arise out of the doctrine of respondeat superior, violations of customary international law, negligence, breach of fiduciary duty, and infliction of emotional distress.

5. Insofar as the Defendant is a "foreign state" for the purposes of the Foreign Sovereign Immunities Act ("FSIA"), as defined in 28 U.S.C. § 1603, the Defendant

has implicitly or explicitly waived any rights under, and/or is estopped from raising, the Foreign Sovereign Immunities Act as a defense to suit by, among other things, failing to raise such defense over a period of decades in settling and acquiescing in settlements of childhood sexual abuse claims against or with respect to itself or its organs, agencies, or instrumentalities in the United States, over which it exercises absolute control and authority under its own CODE OF CANON LAW.

6. Actions of the Defendant occurring in the United States include the transmission and receipt in the United States of policies, directives, orders or other direction or guidance, whether explicit or implicit.

7. Actions of the Defendant with respect to claims set out in this Complaint present fundamental issues of human rights and the protection of children. Such actions have never been given immunity by the United States government. Fundamental human rights violations have been subject to accountability in our courts in the period preceding adoption of the FSIA. There is no evidence that the Congress of the United States sought to immunize such fundamental human rights of children from accountability in our courts by the adoption of the FSIA.

8. Insofar as the Defendant is not a "foreign state" within the meaning of 28 U.S.C. § 1603, or if the Foreign Sovereign Immunities Act is not applicable to any category of claims in this Complaint because such claims preceded the enactment of the FSIA, or any period of retroactivity under FSIA, or if for any other reason the FSIA does not apply to this action, or any part of it, and insofar as the Defendant is an

unincorporated association and headquarters of an international religious organization, this Court has subject matter jurisdiction over all such matters in this action with respect to 28 U.S.C. §§ 1331 and 1332.

9. Insofar as the Defendant is not a "foreign state," or to the extent that the Defendant, Holy See, is an unincorporated association and headquarters of an international religious organization, or if for any other reason the FSIA does not apply to this action, or any part of it, this Court has federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331, because claims pursued herein allege violations of customary international law as codified in international treaties, including but not limited to the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child.* Customary international law, as well as treaties and acts of Congress, are the "supreme law of the land" pursuant to Article VI of the United States Constitution. Issues of interpretation and application of such customary international law provide federal question jurisdiction under § 1331.

10. Insofar as the Defendant is not a "foreign state," or to the extent that the Defendant, Holy See, is an unincorporated association and headquarters of an international religious organization, or if for any other reason the FSIA does not apply to this action, or any part of it, this Court has diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332, because the matter in controversy as to each individual Plaintiff exceeds the sum of $75,000, exclusive of interest and costs, and are between citizens of a state or states and a citizen of a foreign state.

11. For all claims herein upon which subject matter jurisdiction is based upon 28 U.S.C. § 1331 or § 1332, this Court has personal jurisdiction over the Defendant, Holy See, pursuant to KY. REV. STAT. § 454.210. The claims herein arise from the Defendant, Holy See's, acts, directly or by its agents: in transacting business in the Commonwealth of Kentucky; causing tortious injury by an act or omission in this Commonwealth; and/or causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth, and the Defendant, Holy See, regularly does or solicits business, or engages in a persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, and the tortious injury occurring in this Commonwealth arises out of that doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth.

12. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over all other claims herein that that are so related to the claim or claims that form the basis of the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

14. Insofar as the Defendant is a "foreign state" for the purposes of the Foreign Sovereign Immunities Act, as defined in 28 U.S.C. § 1603, service of process is effected pursuant to 28 U.S.C. § 1608(a).

15. Insofar as the Defendant is not a "foreign state," and to the extent that the Defendant, Holy See, is an unincorporated association and headquarters of an international religious organization, or if for any other reason the Foreign Sovereign Immunities Act does not apply to this action, or any part of it, service of process is effected pursuant to KY. REV. STAT. § 454.210(3). The Kentucky Secretary of State is deemed to be the statutory agent of the Defendant, Holy See, for such purpose.

**THE PARTIES**

16. Plaintiff, James H. O'Bryan, individually and on behalf of all similarly situated victims of childhood sexual abuse committed by Roman Catholic bishops, priests, clerics or agents, is an adult male citizen of the state of California. Plaintiff, James H. O'Bryan, was a minor and resident of the Commonwealth of Kentucky and citizen of the United States at the time of the sexual abuse set forth herein below.

17. Plaintiff, Donald E. Poppe, individually and on behalf of all similarly situated victims of childhood sexual abuse committed by Roman Catholic priests, clerics or agents, is an adult male citizen of the state of California. Plaintiff, Donald E. Poppe, was a minor and resident of the Commonwealth of Kentucky and citizen of the United States at the time of the sexual abuse set forth herein below.

18. Plaintiff, Michael J. Turner, individually and on behalf of all similarly situated victims of childhood sexual abuse committed by Roman Catholic priests, clerics or agents, is an adult male citizen of the Commonwealth of Kentucky. Plaintiff, Michael J.

Turner, was a minor and resident of the Commonwealth of Kentucky and citizen of the United States at the time of the sexual abuse set forth herein below.

19. The Defendant, Holy See, is the ecclesiastical, governmental and administrative ruler of the Roman Catholic Church. The Defendant, Holy See, is the composite of the authority, jurisdiction and sovereignty vested in the Pope and his delegated advisors to direct the activities of the worldwide Roman Catholic Church.

20. The Defendant, Holy See, has absolute and unqualified power and control over the Roman Catholic Church, including absolute and unqualified power and control over each and every priest, bishop, brother, sister, parish, diocese, archdiocese and instrumentality of the Church.

21. The Defendant, Holy See, exercises certain powers and engages in certain activities that are peculiar to sovereigns. The Defendant also exercises powers and engages in activities, including commercial activities, that are not peculiar to sovereigns but rather can be and are exercised and engaged in by private actors, including unincorporated associations and headquarters of international religious organizations.

22. The Defendant, Holy See, is a unique entity. It enters into treaties and conventions with other foreign states, including but not limited to the *Universal Declaration of Human Rights* (copy attached hereto as Exhibit A) and the *Convention on the Rights of the Child* (copy attached hereto as Exhibit B), maintains

diplomatic relations with other foreign states, including the United States, and has observer status in the United Nations. The Defendant occupies its own sovereign territory located within the city of Rome, Italy. At the same time, and wholly distinct and separate from its role and activities as a sovereign, it is an unincorporated association and head of the Roman Catholic Church, an international religious organization.

23. The Defendant, Holy See, engages in commercial activity in the Commonwealth of Kentucky, the United States and throughout the world.

24. The Defendant, Holy See, buys and sells real and personal property, and purchases and supplies goods and services.

25. The Defendant, Holy See, is supported through the contributions of its parishioners, which are received as part of a regular course of commercial conduct in the form of donations of money, real property and personal property.

26. A major source of funds for the Defendant, Holy See, is monies received from its parishioners in the form of tithing. The amount of money flowing to the Defendant from the United States is directly affected by the beliefs of its parishioners in the righteousness of the Defendant and its conduct.

27. The Defendant, Holy See, directs, supervises, supports, promotes and engages in providing religious and pastoral guidance, education and counseling services to Roman Catholics worldwide in exchange for

revenues derived from its members and other financial contributors.

28. The Defendant, Holy See, engages in both commercial and religious activities through its agents, servants and employees, including but not limited to bishops, religious orders, priests, brothers, sisters and deacons.

29. The Defendant, Holy See, directs and mandates the morals and standards of conduct of the clergy of the Roman Catholic Church. The Defendant, Holy See, ostensibly does this by and through its agents and instrumentalities, by enforcement of the CODE OF CANON LAW written and promulgated by the Defendant, Holy See.

30. The Defendant, Holy See, creates, divides and realigns dioceses, archdioceses and ecclesiastical provinces. It gives final approval to the creation, division and suppression of provinces of religious orders.

31. The Defendant, Holy See, promotes the sacred liturgy, directs and coordinates the spreading of its faith and other acts necessary to promote the faith.

32. The Defendant, Holy See, creates, appoints, assigns, reassigns and retires all clerics in the order of bishop. It accords definitive approval to the election of the heads of religious orders and, through the religious superiors and the bishops of dioceses, it exercises the power to directly assign and remove individual priests and deacons.

33. All bishops, priests and clergy, including religious order priests, vow to show respect and obedience to the Defendant, Holy See. For example, when a priest is ordained, he kneels before his bishop and promises him and his successors obedience and respect. On the day a priest receives the fullness of the priesthood in his ordination to the episcopacy, he stands before his consecrators and the assembled people of God and promises his obedience and loyalty to the supreme Roman pontiff, the Defendant, Holy See.

34. The Defendant, Holy See, examines and is responsible for the work and discipline and all those things which concern bishops, superiors or religious orders, priests and deacons. In furtherance of this duty, the Defendant, Holy See, among other things, requires bishops to file a report, on a regular basis, outlining the status of and any problems with priests and clergy.

35. The Defendant, Holy See, promulgates and enforces the laws and regulations regarding the education, training and standards of conduct and discipline for those who serve in the governmental, administrative, judicial, educational and pastoral workings of the Roman Catholic Church worldwide.

36. No priest, cleric, superior of a religious order, bishop, archbishop or cardinal may be removed from service or a position of leadership without the approval of the Defendant, Holy See; nor can any priest, cleric, superior of a religious order, bishop, archbishop or cardinal remain in service or a position of leadership over the objection of the Defendant, Holy See.

37. The Defendant, Holy See, is directly and absolutely responsible for removing bishops, archbishops and cardinals from service and/or making them ineligible for positions of leadership in the various divisions and offices of the Roman Catholic Church by issuing instructions, mandates and dictates in the United States.

38. The Defendant, Holy See, has the ultimate authority to give approval or disapproval to the settlement of legal claims, and the terms of such settlements, against its agents, including priests, clerics, superiors of religious orders, bishops and archbishops, arising out of childhood sexual abuse.

## THE CHURCH'S HISTORY OF CHILDHOOD SEXUAL ABUSE

39. The problem of childhood sexual abuse committed by Roman Catholic clerics and others within the Defendant's control is almost as old as the Roman Catholic Church itself. The first formal legislation was passed at the Council of Elvira in Spain in 306 A.D. This council passed legislation condemning sexual abuse by the clergy, including sexual abuse of boys. The Council of Elvira was the first in a series of legislative attempts by the Church to curb its problem of childhood sexual abuse committed by its clergy.

40. In the 11th century, a writing authored by Father Peter Damien, THE BOOK OF GOMORRAH, was presented to the Defendant, Holy See. This work encouraged punishment of priests and clerics who sexually molested and abused children, particularly boys.

41. In 1917 the Defendant, Holy See, codified all of its rules, regulations and laws, including those applicable to the conduct of priests and clergy, in one document known as the CODE OF CANON LAW. This code specifically made it a crime for priests and clerics to have sexual relations or relationships with children under the age of sixteen, demonstrating that the Defendant, Holy See, was well aware of the centuries-old practice of childhood sexual abuse by Roman Catholic priests and clerics. Even today, in the current version of the Code (Vatican II), the sexual abuse of children by priests and clerics is expressly forbidden.

42. The Defendant, Holy See, has known about the widespread problem of childhood sexual abuse committed by its clergy for centuries, but has covered up that abuse. Secret settlement agreements with victims were used to silence the victims and their families and to protect the abuser from criminal prosecution by United States authorities. This practice was designed to shield the Defendant, Holy See, from scandal, and has been mandated not only in the United States but throughout the world, including North and South America, Europe and Australia.

The Defendant, Holy See, is responsible for the historically verified practice of bishops moving sexually abusive priests to areas where allegations of the offender's abusive conduct were not known. The Defendant, Holy See, has never taken appropriate steps to remove sexually abusive priests from the ministry. The absolute power of the Defendant, Holy See, over its bishops in the United States was demonstrated in 2002, when the U.S. Conference of Catholic Bishops adopted a proposed policy designed to

protect children from priest sexual abuse. The bishops were powerless to implement this policy without approval from the Defendant, Holy See. The Defendant, Holy See, denied approval of key provisions sought by the U.S. bishops which would have required that its agents in the United States report all known or suspected child abuse to the civil authorities. The Defendant, Holy See, also refused to give the U.S. bishops the power to remove abusive priests from the ministry.

43. While the "public" policy of the Defendant, Holy See, is to forbid childhood sexual abuse by priests and clerics within its control, the actual "private" or secret policy is to harbor and protect its abusive priests, clerics, bishops, archbishops, cardinals, agents, and employees from public disclosure and prosecution, in order to maintain its aura of infallibility and thereby ensure that its parishioners, followers and financial contributors will not lose faith and fail to contribute money and property to the Defendant, Holy See.

44. The Defendant, Holy See, has mandated a multi-level policy of mandatory secrecy over all matters involving the administrative, legislative and judicial activities of the Vatican offices and departments under the direct authority of the Pope, as well as over all similar activity in the various dioceses throughout the world. The highest level of secrecy is the absolute secrecy mandated for all communications which take place in the sacrament of penance, commonly referred to as "confession." The highest level of secrecy outside the confessional is known as the "Pontifical secret," which is imposed on certain activities of the various departments or congregations of the Holy See. Violation of the Pontifical Secret

results in certain penalties, including excommunication.

45. In March, 1962, the Defendant, Holy See, privately circulated a document containing a set of procedural norms for dealing with the solicitation of sex in confession, clergy sex with minors, homosexual relations, and bestiality. This document imposed the highest level of secrecy on the handling of clergy sexual abuse matters. This document is an official legislative text, issued by the Congregation of the Holy Office and was specifically approved by Pope John XXIII. This document is a reflection and written manifestation of the longstanding policies and directives of the Holy See regarding clergy sexual abuse, and imposed the extreme level of secrecy not only on those who handled such cases but also on the document itself. This secret document was first discovered and made public in July, 2003 by news media in the United States and throughout the world. The policy of the Defendant, Holy See, expressed in this and other documents, requires bishops in the United States, including the Commonwealth of Kentucky, to refuse to report childhood sexual abuse committed by priests to criminal or civil authorities, even though such failure is a criminal offense in most of the United States, including the Commonwealth of Kentucky.

46. The canon laws of the Defendant, Holy See, require an official investigation and formal prosecution of known sexual offenders. However, these laws are enforced only in the rarest of circumstances. For example, over at least the last sixty (60) years, there has never been a single prosecution or official investigation of a priest or cleric within the

Archdiocese of Louisville or any diocese in the Commonwealth of Kentucky, even after repeated allegations of childhood sexual abuse committed by various priests were made known to the three Louisville archbishops who served the Defendant, Holy See.

47. At all times material hereto, and as part of both its course of commercial conduct and particular commercial transactions and acts, the Defendant directed its bishops in the United States to conceal from its parishioners and the general public the sexual abuse of children committed by its priests, bishops, clerics, agents and employees in order to avoid public scandal, and to perpetuate its Christian public image and ensure the continued receipt of funds from its parishioners and other financial contributors, all in furtherance of the Defendant's commercial activities.

48. The Plaintiffs and Class Members were each sexually abused as a child by one (or more) of the Defendant's clerics, agents or employees. The Defendant's directives to conceal the sexual abuse of children committed by its clerics, agents, and employees in order to maximize revenue by avoiding scandal was a substantial factor in bringing about each Class Member's abuse.

49. At all times material hereto, the Defendant, Holy See, violated customary international law of human rights by ignoring, tolerating, disregarding, permitting, allowing, condoning and/or failing to report inhuman and degrading treatment such as the sexual abuse of minor children. This conduct constitutes a violation of various human rights conventions, including the *Universal Declaration of Human Rights*

and the *Convention on the Rights of the Child,* which the Defendant signed and ratified, and the Defendant's violation of customary international law and conventions was a substantial factor in bringing about the Plaintiffs' injuries.

50. At all times material hereto, the Defendant, Holy See, breached duties owed to the Plaintiffs under customary international law of human rights, the federal common law, the law of the fifty states, and the law of the Commonwealth of Kentucky, thereby causing injury to the Plaintiffs.

51. At all times material hereto, the Defendant, Holy See's directives, which, among other things, prohibited the reporting of child sexual abuse to law enforcement authorities, constitute an act or acts of concealment or misleading or obstructive conduct under statutory law, common law, and customary international law.

52. At all times material hereto, the Defendant, Holy See's concealment of its policy of harboring and protecting its abusive priests, clerics, bishops, archbishops, cardinals, agents and employees from public disclosure and prosecution constitutes an act or acts of concealment or misleading or obstructive conduct under statutory law, common law, and customary international law.

## CLASS DEFINITIONS

53. Class I consists of all persons who have not previously brought claims against an agent or servant of the Defendant, Holy See, in the United States, including the Commonwealth of Kentucky, arising out

of the childhood sexual abuse he or she suffered at the hands of a Roman Catholic priest, cleric, bishop, archbishop, cardinal, agent or employee, who have not received compensation from any agent, servant or instrumentality of the Defendant, Holy See, in the United States, including the Commonwealth of Kentucky, and who have not released any agent, servant or instrumentality of the Defendant, Holy See, from further liability. Class I is represented by Plaintiffs James H. O'Bryan and Donald E. Poppe.

54. Class II consists of all persons who have previously brought legal claims against an agent or servant of the Defendant, Holy See, in the United States, including the Commonwealth of Kentucky, arising out of the childhood sexual abuse he or she suffered at the hands of a Roman Catholic priest, cleric, agent or employee; who also have received compensation from an agent, servant or instrumentality of the Defendant, Holy See, in the United States, including the Commonwealth of Kentucky; and who also have released that agent, servant or instrumentality of the Defendant, Holy See from further liability. Class II is represented by Plaintiff Michael J. Turner.

## ALLEGATIONS AND CLAIMS OF CLASS I

55. Plaintiffs, James H. O'Bryan and Donald E. Poppe, bring this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all victims of childhood sexual abuse committed by Roman Catholic priests, clerics or agents, who have not heretofore entered into a settlement agreement and release of any diocese, archdiocese, agent or instrumentality of the

Defendant, Holy See, within the Commonwealth of Kentucky or the United States, and who now assert claims against the Defendant, Holy See.

56. Because the number of victims of childhood sexual abuse as set forth in the preceding paragraph are so numerous, joinder of all members is impracticable. While the exact number of class members is unknown to Plaintiffs at this time, Plaintiffs believe there are at least several thousand members of the class.

57. At all times material hereto, Defendant, Holy See, possessed and exercised the absolute right to control all its priests, clerics, bishops, archbishops, cardinals, agents and servants within the Commonwealth of Kentucky and the United States.

58. At all times material hereto, the Defendant, Holy See, had the absolute right to control the places of worship, educational facilities and instructors, and agents of the Roman Catholic Church within the Commonwealth of Kentucky and the United States.

59. At all times material hereto, these Plaintiffs were victimized by priests, clerics and other agents of the Defendant, Holy See, acting in furtherance of the purposes of the Defendant, Holy See, doing the kinds of acts they were engaged to perform, including educating and/or counseling minor children in the Roman Catholic traditions, taking confession, and overseeing their roles as altar boys and servers, and who were motivated, at least in part, to further the purposes of the Defendant, Holy See.

60. The Defendant, Holy See, by and through its agents, provided priests, clerics, bishops, archbishops, cardinals, agents and employees, who were committing acts of sexual abuse against minor children in Roman Catholic schools and parishes, the facilities and faculties to perform as Roman Catholic priests and clerics, and provided them the opportunity to continue their abusive conduct.

61. The Defendant, Holy See, by and through its agents, certified and held sexually abusive priests, clerics and other agents out to the community of the faithful as fit and competent agents of the Defendant, Holy See, and as ministers of Christ. The priest and cleric perpetrators of childhood sexual abuse in the parishes and schools of the Roman Catholic Church in the Commonwealth of Kentucky and the United States, were acting as agents of the Defendant, Holy See, in ministering to the community of the faithful, including performing sacraments, taking confession, educating and counseling children on the word of God, and the law of the Roman Catholic Church, in providing aid, comfort and counseling, in exchange for financial contributions and support for the Defendant, Holy See.

62. The Defendant, Holy See, by and through its agents, enabled priests and clerics who were committing acts of sexual abuse against minor children in Roman Catholic schools and parishes, to continue to perform as Roman Catholic priests and clerics by its refusal to report such abuse to civil or criminal authorities, by its refusal to unilaterally laicize known clergy sexual abusers, and by its refusal to assist the bishops in the United States in their

efforts to report suspected sexual abuse to authorities and to laicize known clergy sexual abusers.

63. Plaintiff, James H. O'Bryan, was sexually abused, molested and assaulted by a Roman Catholic priest in the 1920s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.

64. Plaintiff, Donald E. Poppe, was sexually abused, molested and assaulted by a Roman Catholic priest in the early 1960s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.

65. The sexual molestation of Plaintiffs, James H. O'Bryan and Donald E. Poppe, occurred while the abusive Roman Catholic priest, agent servant or employee was acting in the scope of his employment, as part of an agency relationship with the Defendant, Holy See, and the misconduct was committed with the apparent authority arising from this employment and/or agency relationship. The sexually abusive Roman Catholic priest, agent servant or employee was executing the very duties which he was assigned to perform.

66. Due to the nature of the duties of the Defendant's priests, clerics and agents and the vast disparity of power that existed within the aforesaid fiduciary relationship, the Defendant, Holy See, is liable for the negligent and/or wrongful conduct of its agents performing Defendant's activities and commercial activities, including a course of fundraising

activities and particular acts of administering private education and counseling programs in exchange for money. These agents include the Roman Catholic Bishop of Louisville, Inc., and other Roman Catholic bishops, archbishops, and cardinals throughout the Commonwealth of Kentucky and the United States, as well as the various orders and its priests and other agents and servants who committed childhood sexual abuse against the Plaintiffs as described in the causes of action herein under the law of direct and vicarious liability, including the doctrine of *respondeat superior*.

67. As a direct and proximate result of the conduct of the Defendant, Holy See, as set forth herein, the Plaintiffs and other similarly situated individuals, have suffered serious mental distress, physical and mental pain and suffering from their childhood to the present and will continue to suffer serious mental distress and physical and mental pain and suffering for the remainder of their lives.

**CLASS I - COUNT I**

**RESPONDEAT SUPERIOR LIABILITY**

68. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 67 as if set forth fully herein.

69. The conduct of the agents, servants, employees and ostensible agents of the Defendant, Holy See, in the United States set forth herein was committed in the course and scope of delegated duties and authority granted by the Defendant, Holy See, in the United States, thereby rendering the Defendant, Holy See, vicariously liable under the common law of the states,

the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights for the conduct of those agents, servants, employees and ostensible agents under the doctrine of *respondeat superior* ("let the master answer").

## CLASS I - COUNT II

## VIOLATION OF CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

70. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 69 as if set forth fully herein.

71. The instructions, mandates and dictates of the Defendant, Holy See in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control, thereby placing children in a position of peril, is a gross violation of well-established, universally recognized norms of international law of human rights. The customary international law of human rights has been codified in various international agreements, including but not limited to:

a. the *Universal Declaration of Human Rights*, in that the Defendant, Holy See, as a matter of policy, at all times practiced, ignored, tolerated, disregarded, permitted, allowed, condoned or failed to report childhood sexual abuse which the international community and the civilized world views as cruel, inhumane and degrading; and

b. the *Convention on the Rights of the Child,* in that the Defendant, Holy See, among other things, did not make the interests of minor children in its control their primary responsibility; did not conform to international standards for the safety and health of those children in considering the suitability of their priests, clerics, bishops, archbishops, cardinals, agents and servants; did not take all appropriate legislative, administrative, social and educational measures to protect those children from sexual abuse; did not prevent, identify, report, investigate, treat or follow-up on instances of childhood sexual abuse of which it had knowledge; did not take all appropriate measures to ensure that school discipline was administered in a manner consistent with human dignity; and did not undertake to protect those children from sexual exploitation and abuse.

72. The Defendant, Holy See, signed the *Universal Declaration of Human Rights* in 1948; the Defendant, Holy See, signed the *Convention on the Rights of the Child* in 1990.

73. The worldwide acceptance of various international agreements, including the *Convention on the Rights of the Child,* demonstrates that some of their provisions have attained the status of customary international law. The *Convention on the Rights of the Child* provides that "in all actions concerning children . . . the best interests of the child shall be a primary consideration," Art. 3, that the signatories "shall take all appropriate legislative, administrative, social and educational measures to protect the child from all

forms of physical or mental violence, injury or abuse, . . . , including sexual abuse," Art. 19, and that they "undertake to protect the child from all forms of sexual exploitation and sexual abuse," Art. 34. These provisions codify longstanding legal human rights norms that reflect actual practices of states in prohibiting childhood sexual abuse, are not so novel as to be considered outside the bounds of what is customary, and are of universal concern.

The practices, instructions, mandates, and dictates of the Defendant, Holy See, in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control and thereby placing children in positions of harm, whether undertaken under the color of law or only in its capacity as a private actor, are violations of customary international law, and are crimes to which the law of nations attributes individual responsibility.

## CLASS I - COUNT III

## NEGLIGENCE OF DEFENDANT, HOLY SEE

74. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 73 as if set forth fully herein.

75. The Defendant, Holy See, by and through its agents, servants and employees, breached duties owed to the Plaintiffs under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights, including but not limited to:

a. The duty to provide safe care, custody and control of the minor children entrusted by their parents to the Roman Catholic churches and schools under the absolute control of the Defendant, Holy See.

b. The duty to warn parents who entrusted their children's care, custody and control to the churches and schools of the Roman Catholic Church that priests and other clerics were known pedophiles, sexual predators and perpetrators of childhood sexual abuse.

c. The duty to report known or suspected perpetrators of childhood sexual abuse to authorities as required by statutory law, common law, and customary international law.

76. The Defendant, Holy See, knew that its priests, clerics and agents in the United States, including the Commonwealth of Kentucky, were committing acts of childhood sexual abuse and engaging in dangerous and exploitive conduct as pedophiles, sexual predators and perpetrators of childhood sexual abuse, and that these priests, clerics, bishops, archbishops, cardinals, agents, and employees created an unsafe condition on the premises of the aforesaid churches and schools, institutions to whom the custody and control of said minor children was placed.

77. The acts and omissions of the Defendant, Holy See alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, agents and employees from public disclosure and

prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, were a substantial factor in bringing about the damages suffered by the Plaintiffs as a result of childhood sexual abuse.

## CLASS I - COUNT IV

## BREACH OF FIDUCIARY DUTY

78. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 77 as if set forth fully herein.

79. A special legal relationship existed between the Plaintiffs and the Defendant, Holy See, in the nature of a fiduciary relationship, which relationship was carried out by and through priests, clerics and administrators under the direct and absolute control of the Defendant, Holy See, in their capacity as paid educators and/or counselors of minor children in the private schools of the Roman Catholic Church in the Commonwealth of Kentucky and the United States.

80. The Defendant breached fiduciary duties owed to the Plaintiffs under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights, including but not limited to:

a. The duty to warn parents, who entrusted their children's care, custody and control to the churches and schools of the Roman Catholic Church, that its priests, clerics and

agents in those churches and schools were known pedophiles, sexual predators and perpetrators of childhood sexual abuse.

b. The duty to report known or suspected perpetrators of childhood sexual abuse to authorities as required by statutory law, the common law, and customary international law.

## CLASS I - COUNT V

## TORT OF OUTRAGE/ INFLICTION OF EMOTIONAL DISTRESS

81. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 80 as if set forth fully herein.

82. The acts and omissions of the Defendant, Holy See alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children in a position of peril, is conduct which is so outrageous and extreme in degree, as to go beyond all possible bounds of decency, so as to be regarded as utterly atrocious in a civilized society.

83. Such atrocities form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the law of the

Commonwealth of Kentucky and customary international law of human rights.

## CLASS I - COUNT VI

## DECEIT

**(Claim Against the Holy See in its Capacity as an Unincorporated Association and Head of an International Religious Organization Only)**

84. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 83 as if set forth fully herein.

85. The acts and omissions of the Defendant, Holy See, in its capacity as an unincorporated association and head of an international religious organization alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, bishops, archbishops, cardinals, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children at an unreasonable risk of physical harm, constitutes the fraudulent misrepresentation or nondisclosure of a fact that the Defendant, Holy See, was under a duty to disclose, and upon which the Plaintiffs, and their parents, justifiably relied.

86. Such acts and omissions form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the

law of the Commonwealth of Kentucky and customary international law of human rights.

## CLASS I - COUNT VII

## MISREPRESENTATION

**(Claim Against the Holy See in its Capacity as an Unincorporated Association and Head of an International Religious Organization Only)**

87. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 86 as if set forth fully herein.

88. The acts and omissions of the Defendant, Holy See, in its capacity as an unincorporated association and head of an international religious organization alleged herein, including intentionally or negligently certifying and holding sexually abusive priests, clerics and other agents out to the community of the faithful as fit and competent agents of the Defendant, Holy See, and as ministers of Christ, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children at an unreasonable risk of physical harm, constitutes a conscious or negligent misrepresentation upon which the Plaintiffs, and their parents, justifiably relied.

89. Such acts and omissions form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights.

## CLASS I - COUNT VIII

## INJUNCTIVE RELIEF

90. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 89 as if set forth fully herein.

91. As a result of the violations under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights set forth herein, and in addition to monetary damages for those violations, the Plaintiffs seek orders:

a. requiring that the Defendant, Holy See, cease its violations of the internationally recognized human rights of children;

b. requiring the Defendant, Holy See, to report all allegations of childhood sexual abuse in each and every one of the United States;

c. requiring that the Defendant, Holy See, conform its conduct to the mandates of the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights;

d. requiring that Defendant, Holy See, act in ways that are in the best interests of children; and

e. retaining jurisdiction in this Court for a period of no less than ten (10) years to ensure that the interests of children are not further compromised by the conduct of the Defendant, Holy See.

## ALLEGATIONS AND CLAIMS OF CLASS II

92. Plaintiff, Michael J. Turner, brings this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of victims of childhood sexual abuse committed by Roman Catholic priests, clerics or agents, who have settled a claim of childhood sexual abuse with a diocese, archdiocese, or other agent or servant of the Defendant, Holy See, in the Commonwealth of Kentucky or the United States and who now assert claims against the Defendant, Holy See.

93. Because the number of victims of childhood sexual abuse as set forth in the preceding paragraph are so numerous, joinder of all members is impracticable. While the exact number of class members is unknown to Plaintiffs at this time, Plaintiffs believe there are at least several thousand members of the class.

94. At all times material hereto, Defendant, Holy See, possessed and exercised the absolute right to control all its priests, clerics, bishops, archbishops, cardinals, agents and servants within the Commonwealth of Kentucky and the United States.

95. At all times material hereto, the Defendant, Holy See, had the absolute right to control the places of worship, educational facilities and instructors, and

agents of the Roman Catholic Church within the Commonwealth of Kentucky and the United States.

96. At all times material hereto, these Plaintiffs were victimized by priests, clerics and other agents of the Defendant, Holy See, acting in furtherance of the purposes of the Defendant, Holy See, doing the kinds of acts they were engaged to perform, including educating and/or counseling minor children in the Roman Catholic traditions, taking confession, and overseeing their roles as altar boys and servers, and who were motivated, at least in part, to further the purposes of the Defendant, Holy See.

97. The Defendant, Holy See, by and through its agents, provided priests, clerics, bishops, archbishops, cardinals, agents and employees, who were committing acts of sexual abuse against minor children in Roman Catholic schools and parishes, the facilities and faculties to perform as Roman Catholic priests and clerics, and provided them the opportunity to continue their abusive conduct.

98. The Defendant, Holy See, by and through its agents, certified and held sexually abusive priests, clerics and other agents out to the community of the faithful as fit and competent agents of the Defendant, Holy See, and as ministers of Christ. The priest and cleric perpetrators of childhood sexual abuse in the parishes and schools of the Roman Catholic Church in the Commonwealth of Kentucky and the United States, were acting as agents of the Defendant, Holy See, in ministering to the community of the faithful, including performing sacraments, taking confession, educating and counseling children on the word of God, and the law of the Roman Catholic Church, in

providing aid, comfort and counseling, in exchange for financial contributions and support for the Defendant, Holy See.

99. The Defendant, Holy See, by and through its agents, enabled priests and clerics who were committing acts of sexual abuse against minor children in Roman Catholic schools and parishes, to continue to perform as Roman Catholic priests and clerics by its refusal to report such abuse to civil or criminal authorities, by its refusal to unilaterally laicize known clergy sexual abusers, and by its refusal to assist the bishops in the United States in their efforts to report suspected sexual abuse to authorities and to laicize known clergy sexual abusers.

100. Plaintiff, Michael J. Turner, was sexually abused, molested and assaulted by a Roman Catholic priest in the mid 1970s, while Plaintiff was under the care, custody, authority, control and influence of an abusive Roman Catholic priest, which authority was granted to him by the Defendant, Holy See.

101. The sexual molestation of Plaintiff, Michael J. Turner, occurred while the abusive Roman Catholic priest, agent servant or employee was acting in the scope of his employment, as part of an agency relationship with the Defendant, Holy See, and the misconduct was committed with the apparent authority arising from this employment and/or agency relationship. The sexually abusive Roman Catholic priest, agent servant or employee was executing the very duties which he was assigned to perform.

102. As a direct and proximate result of the conduct of the Defendant, Holy See, as set forth herein, the

Plaintiff and other similarly situated individuals have suffered serious mental distress, physical and mental pain and suffering from their childhood to the present and will continue to suffer serious mental distress and physical and mental pain and suffering for the remainder of their lives.

## CLASS II - COUNT I

## VIOLATION OF CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

103. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 102 as if set forth fully herein.

104. The instructions, mandates and dictates of the Defendant, Holy See in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control, thereby placing children in a position of peril, is a gross violation of well-established, universally recognized norms of international law of human rights. The customary international law of human rights has been codified in various international agreements, including but not limited to:

a. the *Universal Declaration of Human Rights,* in that the Defendant, Holy See, as a matter of policy, at all times practiced, ignored, tolerated, disregarded, permitted, allowed, condoned or failed to report childhood sexual abuse which the international community and the civilized world views as cruel, inhumane and degrading; and

b. the *Convention on the Rights of the Child,* in that the Defendant, Holy See, among other things, did not make the interests of minor children in its control their primary responsibility; did not conform to international standards for the safety and health of those children in considering the suitability of their priests, clerics, bishops, archbishops, cardinals, agents and servants; did not take all appropriate legislative, administrative, social and educational measures to protect those children from sexual abuse; did not prevent, identify, report, investigate, treat or follow-up on instances of childhood sexual abuse of which it had knowledge; did not take all appropriate measures to ensure that school discipline was administered in a manner consistent with human dignity; and did not undertake to protect those children from sexual exploitation and abuse.

105. The Defendant, Holy See, signed the *Universal Declaration of Human Rights* in 1948; the Defendant, Holy See, signed the *Convention on the Rights of the Child* in 1990.

106. The worldwide acceptance of various international agreements, including the *Convention on the Rights of the Child,* demonstrates that some of their provisions have attained the status of customary international law. The *Convention on the Rights of the Child* provides that "in all actions concerning children . . . the best interests of the child shall be a primary consideration," Art. 3, that the signatories "shall take all appropriate legislative, administrative, social and

educational measures to protect the child from all forms of physical or mental violence, injury or abuse, . . . , including sexual abuse," Art. 19, and that they "undertake to protect the child from all forms of sexual exploitation and sexual abuse," Art. 34. These provisions codify longstanding legal human rights norms that reflect actual practices of states in prohibiting childhood sexual abuse, are not so novel as to be considered outside the bounds of what is customary, and are of universal concern.

The practices, instructions, mandates, and dictates of the Defendant, Holy See, in the United States prohibiting the disclosure of the identity and existence of pedophiles and sexual predators under its control and thereby placing children in positions of harm, whether undertaken under the color of law or only in its capacity as a private actor, are violations of customary international law, and are crimes to which the law of nations attributes individual responsibility.

## CLASS II - COUNT II

## NEGLIGENCE OF DEFENDANT, HOLY SEE

107. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 106 as if set forth fully herein.

108. The Defendant, Holy See, by and through its agents, servants and employees, breached duties owed to the Plaintiffs under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and

customary international law of human rights, including but not limited to:

a. The duty to provide safe care, custody and control of the minor children entrusted by their parents to the Roman Catholic churches and schools under the absolute control of the Defendant, Holy See.

b. The duty to warn parents who entrusted their children's care, custody and control to the churches and schools of the Roman Catholic Church that priests and other clerics were known pedophiles, sexual predators and perpetrators of childhood sexual abuse.

c. The duty to report known or suspected perpetrators of childhood sexual abuse to authorities as required by statutory law, common law, and customary international law.

109. The Defendant, Holy See, knew that its priests, clerics and agents in the United States, including the Commonwealth of Kentucky, were committing acts of childhood sexual abuse and engaging in dangerous and exploitive conduct as pedophiles, sexual predators and perpetrators of childhood sexual abuse, and that these priests, clerics, bishops, archbishops, cardinals, agents, and employees created an unsafe condition on the premises of the aforesaid churches and schools, institutions to whom the custody and control of said minor children was placed.

110. The acts and omissions of the Defendant, Holy See alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, were a substantial factor in bringing about the damages suffered by the Plaintiffs as a result of childhood sexual abuse.

## CLASS II - COUNT III

## BREACH OF FIDUCIARY DUTY

111. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 110 as if set forth fully herein.

112. A special legal relationship existed between the Plaintiffs and the Defendant, Holy See, in the nature of a fiduciary relationship, which relationship was carried out by and through priests, clerics and administrators under the direct and absolute control of the Defendant, Holy See, in their capacity as paid educators and/or counselors of minor children in the private schools of the Roman Catholic Church in the Commonwealth of Kentucky and the United States.

113. The Defendant breached fiduciary duties owed to the Plaintiffs under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights, including but not limited to:

a. The duty to warn parents, who entrusted their children's care, custody and control to the churches and schools of the Roman Catholic Church, that its priests, clerics and agents in those churches and schools were known pedophiles, sexual predators and perpetrators of childhood sexual abuse.

b. The duty to report known or suspected perpetrators of childhood sexual abuse to authorities as required by statutory law, the common law, and customary international law.

## CLASS II - COUNT IV

## TORT OF OUTRAGE/ INFLICTION OF EMOTIONAL DISTRESS

114. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 113 as if set forth fully herein.

115. The acts and omissions of the Defendant, Holy See alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children in a position of peril, is conduct which is so outrageous and extreme in degree, as to go beyond all possible bounds of decency, so as to be regarded as utterly atrocious in a civilized society.

116. Such atrocities form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights.

## CLASS II - COUNT V

## DECEIT

**(Claim Against the Holy See in its Capacity as an Unincorporated Association and Head of an International Religious Organization Only)**

117. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 116 as if set forth fully herein.

118. The acts and omissions of the Defendant, Holy See, in its capacity as an unincorporated association and head of an international religious organization alleged herein, including the concealment of its policy of harboring and protecting its abusive priests, bishops, archbishops, cardinals, agents and employees from public disclosure and prosecution and directives prohibiting the reporting of child sexual abuse to authorities, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children at an unreasonable risk of physical harm, constitutes the fraudulent misrepresentation or nondisclosure of a fact that the Defendant, Holy See, was under a duty to disclose, and upon which the Plaintiffs, and their parents, justifiably relied.

119. Such acts and omissions form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights.

## CLASS II - COUNT VI

## MISREPRESENTATION

**(Claim Against the Holy See in its Capacity as an Unincorporated Association and Head of an International Religious Organization Only)**

120. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 119 as if set forth fully herein.

121. The acts and omissions of the Defendant, Holy See, in its capacity as an unincorporated association and head of an international religious organization alleged herein, including intentionally or negligently certifying and holding sexually abusive priests, clerics and other agents out to the community of the faithful as fit and competent agents of the Defendant, Holy See, and as ministers of Christ, as part of a regular course of commercial conduct and particular commercial transactions and acts, thereby placing children at an unreasonable risk of physical harm, constitutes a conscious or negligent misrepresentation upon which the Plaintiffs, and their parents, justifiably relied.

122. Such acts and omissions form the bases of civil liability under the common law of the states, the federal common law, the laws of the fifty states, the

law of the Commonwealth of Kentucky and customary international law of human rights.

## CLASS II - COUNT VII

## INJUNCTIVE RELIEF

123. The Plaintiffs adopt, reiterate and incorporate by reference each and every allegation contained in paragraphs 1 through 122 as if set forth fully herein.

124. As a result of the violations under the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights set forth herein, and in addition to monetary damages for those violations, the Plaintiffs seek orders:

a. requiring that the Defendant, Holy See, cease its violations of the internationally recognized human rights of children;

b. requiring the Defendant, Holy See, to report all allegations of childhood sexual abuse in each and every one of the United States;

c. requiring that the Defendant, Holy See, conform its conduct to the mandates of the common law of the states, the federal common law, the laws of the fifty states, the law of the Commonwealth of Kentucky and customary international law of human rights;

d. requiring that Defendant, Holy See, act in ways that are in the best interests of children; and

e. retaining jurisdiction in this Court for a period of no less than ten (10) years to ensure that the interests of children are not further compromised by the conduct of the Defendant, Holy See.

**WHEREFORE**, the Plaintiffs, James H. O'Bryan, Donald E. Poppe and Michael J. Turner, on behalf of themselves and all other similarly situated individuals, demand judgment against the Defendant, Holy See, for compensatory damages and, where applicable, punitive damages; for the injunctive relief sought herein; for their costs herein expended, including attorneys' fees; for trial by jury on any and all issues so triable; and for any and all further legal and equitable relief to which the Plaintiffs may appear entitled.

/s/_____
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* * *

*[exhibits to complaint omitted in this appendix]*

## APPENDIX F

[CONFIDENTIAL]

FROM THE SUPREME AND HOLY CONGREGATION OF THE HOLY OFFICE

FOR ALL PATRIARCHS, ARCHBISHOPS, BISHOPS AND OTHER DIOCESAN ORDINARIES "EVEN OF THE ORIENTAL RITE"

INSTRUCTION

ON THE MANNER OF PROCEEDING IN CASES OF SOLICITATION

The Vatican Press, 1962

++5++

INSTRUCTION

On the manner of proceeding in cases of the crime of solicitation

[This text is] to be diligently stored in the secret archives of the Curia as strictly confidential. Nor is it to be published nor added to with any commentaries.

PRELIMINARIES

1. The crime of solicitation takes place when a priest tempts a penitent, whoever that person is, either in the act of sacramental confession, whether

before or immediately afterwards, whether on the occasion or the pretext of confession, whether even outside the times for confession in the confessional or [in a place] other than that [usually] designated for the hearing of confessions or [in a place] chosen for the simulated purpose of hearing a confession. [The object of this temptation] is to solicit or provoke [the penitent] toward impure and obscene matters, whether by words or signs or nods of the head, whether by touch or by writing whether then or after [the note has been read] or whether he has had with [that penitent] prohibited and improper speech or activity with reckless daring (Constitution Sacrum Poenitentiae, § 1).

2. [The right or duty of addressing] this unspeakable crime in the first instance pertains to the Ordinaries of the place in whose territory the accused has residence (V. below, numbers 30 and 31), and this not to mention through proper law but also from a special delegation of the Apostolic See; It is enjoined upon these aforementioned persons to the fullest extent possible, [in addition to their being] gravely encumbered by their own consciences, that, after the occurrence of cases of this type, that they, as s son as possible, take care to introduce, discuss and terminate [these cases] with their proper tribunal. However, because of particular and serious reasons, according to the norm of Canon 247, § 2, these cases can be directly deferred to the Holy Congregation of the Holy Office or be so ordered. Yet [the right of] the accused respondents ++6++ remains intact in any instance of judgment to have recourse to the Holy Office. However, recourse thus interposed does not suspend, excluding the case of an appeal, the exercise of the jurisdiction of the judge who has already begun to

accept the case; and he can therefore be able to pursue the judgment up to the definitive decision, unless it has been established that the Apostolic See has summoned the case to itself (Cfr. Canon 1569).

* * *

[p.003] he has been legitimately cited and is not present at some [parts of the] Acts, the Acts indeed are valid, but afterwards [those Acts] will be totally subject to his examination so that he is able to comment upon all of them either in words or in writing and to propose what he has judged to be necessary or opportune (Canon 1587).

9. It is fitting that the notary, on the other hand, be present at all the Acts under pain of nullity and to note down with his own hand or at least to affix his signature [to the aforesaid Acts] (Canon 1585, § 1). Because of the special character of these procedures, however, it is necessary for the Ordinary to dispense from the presence of the notary, though because of a reasonable excuse in the acceptance, as will be noted in its own place, of the denunciations and also in the expenditure of the degrees of attention or care expected of a notary in a given situation, as they say, in pursuing and in examining the witnesses inducted [into the case].

10. Minor helpers are to be used for nothing unless it is absolutely necessary; and these are to be chosen, in so far as possible, from the priestly order; always, however, they are to be of proved faithfulness and mature without exception. But it must be noted that, if, when necessity demands it, they can be nominated to accept certain acts, even if they are non-subjects

living in another territory or the Ordinary of that territory [can] be interrogated (Can. 1570, § 2), observing, of course, all of the cautions treated as above and in Canon 1613.

11. Because, however, what is treated in these cases has to have a greater degree of care and observance so that those same matters be pursued in a most secretive way, and, after they have been defined and given over to execution, they are to be restrained by a perpetual silence (Instruction of the Holy Office, February 20, 1867, n. 14), each and everyone pertaining to the tribunal in any way or admitted to knowledge of the matters because of their office, is to observe the strictest ++7++ secret, which is commonly regarded as a secret of the Holy Office, in all matters and with all persons, under the penalty of excommunication latae sententiae, ipso facto and without any declaration [of such a penalty] having been incurred and reserved to the sole person of the Supreme Pontiff, even to the exclusion of the Sacred Penitentiary, are bound to observe [this secrecy] inviolably. Indeed by this law the Ordinaries are bound ipso jure or by the force of their own proper duty. The other helpers from the power of their oath which they they must always take before they undertake their duties. And these, then, are delegated, are interpolated, and are informed in their absence by means of the precept in the letters of delegation, interpellation, [or of] information, imposing upon them with express mention of the secret of the Holy Office and of the aforementioned censure.

12. The aforesaid oath, the formula for which is to be found in the appendix of this instruction (Form A), must be used (by those, obviously, who will use it

habitually, once for all; by those, however, who are deputed only for some determined piece of business or case, as often as required (toties quoties), in the presence of the ordinary or his delegate done upon the Gospels of God (also by priests) and not otherwise and with the added promise of fulfiling faithfullly their duty, to which, howver, the excommunication, mentioned above, is not extended. There must be an [p.004] avoidance, moreover, by those who are set over those involved in this cases, lest anyone be admitted to a knowledge of the matters from helpers, unless in some way a party or an office to be performed by that person necessarily requires a knowledge of these matters.

13. The oath of keeping the secret must be given in these cases also by the accusers or those denouncing [the priest] and the witnesses. To none of these, however, is there subjection to a censure, unless by chance toward these same pesons some censure has been expressly threatened upon the person himself, for his accusation, his deposition or of his violation (Excussionis?) [of such] by act. The accused, however, should be most seriously warned that even he, with all [the others], especially when he observes the secret with his defender, is under the penalty of suspension a divinis in case of a transgression to be incurred ipso facto.

14. Finally, as for the publishing, the language, the confirmation, the custody of and the accidental nullity, in every way [these matters] must be observed which are prescribed by Canons 1642-43, 379-8-82 and 1680 respectively.

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## TITLE NUMBER ONE
## THE FIRST KNOWLEDGE OF THE CRIME

15. Since the crime of solicitation takes place in rather rare decisions, lest it remain occult and unpunished and always with inestimable detriment to souls, it was necessary for the one person, as for many persons, conscious of that [act of solicitation], namely, the solicited penitent, to be compelled to reveal it through a denunciation imposed by positive law. Therefore:

16. "According to the Apostolic Constitutions and especially of the Constitution of Benedict XIV Secramentum Poenitentiae of June 1, 1941, the penitent must denounce the accused priest of the delict of solicitation in confession within a month to the Ordinary of the place or to the Holy Congregation of the Holy Office;, and the confessor must, burdened seriously in conscience, to warn the penitent of this duty." (Canon 904).

17. Moreover, according to the mind of Canon 1935 anyone of the faithful can always denunouce the delict of solicitation, of which he will have had a certain knowledge; also, the obligation of denunciation urges as often as the person is bound to it from the natural law itself because of the danger to faith or religion or other imminent public evil.

18. "The faithful, however, who knowingly have disregarded the obligation to denounce the person by whom he was solicited, against the prescription (related above) of Canon 904, within a month, falls into

an excommunication reserved latae sententiae, not to be absolved unless after he has satisfied the obligation or has promised seriously that he would so" (Can. 2368, § 2).

19. The duty of denunciation is a personal one and is to be fulfilled regularly by the person himself who has been solicited. But if he is prevented by the most serious difficulties from doing this, then either by [p.005] letter or by another person favorable to him should approach the ordinary or the Holy Congregation of the Holy Office or the Sacred Penitentiary, revealing all the circumstances (Instruction of the Holy Office, February 20, 1967, n. 7).

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20. Anonymous denunciations generally must be rejected. However, they can have supportive force or give the occasion for further investigations, if the particular circumstances of the matters involved render an accusation probable (Cfr. Can. 1942, § 2).

21. The obligation of denunciation on the part of the solicited penitent does not cease because of a spontaneous confession by the soliciting confessor done by chance, nor because of his being transferred, promoted, condemned, or presumably reformed and other reasons of the same kind. It ceases, however, at his death.

22. Sometimes it happens that the confessor or another ecclesiastic man is deputed to receive some denunciation, together with an instruction concerning the acts to be assumed for a judicial reason. Then that

person is to be expressly warned that he should tell everything to the Ordinary or to the person whom he deputed, keeping no example or trace of it to himself.

23. In receiving the denunciations, this order is to be regularly observed: First, an oath to tell the truth while touching the Holy Gospels is to be given to the person making the denunciation; he should be interrogated according to the formula (Formula E), circumspectly, so that he narrates each and every circumstance briefly, indeed, and decently, but clearly and distinctly, pertaining to the solicitations he has suffered. In no way, however is it to be extracted from him whether he had consented to the solication. Rather, he should be expressly advised that he is not bound to manifest his consent which he perhaps gave. The responses [in uninterrupted fashion], not only as to what pertains to the substance but even to the words themselves of the testimony (Canon 1778) should be consigned to writing. The entire instrument [of the testimony] should be read in a clear and distinct voice to the one denouncing [the priest], giving [the one denouncing the priest] the option of adding, suppressing, correcting, or varying [his testimony]. His signature is then to be exacted [from him], or, if he does not know how to write, or cannot, the sign of the cross. And with him still being present, there should be added the signature of the person receiving the testimony, and if he is present (Cfr. n. 9), of the notary. And before he is dismissed, there should be presented to him, as above, an oath of observing the secret, threatening him, if there is a need, with an excommunciation reserved to the Ordinary or to the Holy See (Cfr. n. 13).

24. Even if, sometimes, for grave obstructing reasons always to be expressed in the acts, this ordinary practice cannot be observed, it is permitted that one or the other form from the prescribed forms, saving however the substance, ++11++ be omitted. Thus, if the oath cannot be taken upon the holy Gospels, it can be given with some notion and also with words only. If the instrument of denunciation cannot be put into writing in an uninterrupted fashion, it can be written down at a more opportune time and place by the interviewer (the recipient of the denunciation) and then

* * *

[p.008] 32. As to what pertains to the second letter (b), the importance of each denunciation, of their qualities and of the circumstances must be weighed seriously and accurately so that it is evident how they themselves merit belief. It is not sufficient that [this be done] in any way whatsoever, but it is necessary that this become known by means of an established and a judicial form; this customarily is signified in the Tribunal of the Holy Office by the phrase "diligentias peragere" [to undertake all the required formalities].

33. In order to arrive at this purpose [of undertaking all the required formalities], as soon as the Ordinary shall have accepted any denunciation of the crime of solicitation, either personally or through a priest, he will summon, either personally or through a priest specially delegated to do so, two witnesses (he summons them separately and with appropriate circumspection) and wich appropriate circumspection) two witnesses, in so far as it is possible, from the ranks of the ecclesiastics. But it is far better, above any

exception, to summon persons, who are familiar with both the one denounced and the one denouncing. These persons, with the notary present (cfr. n. 9), who is to put the interrogations and responses in writing, [are put] under the sanctity of an oath to tell the truth and to observe its secret nature, accompanied by the threat, if it seems necessary, of excommunication reserved to the Ordinary of the place or to the Holy See (cfr. n. 13). He will interrogate them (Formula G), concerning the life, morals and public reputation both of the one denounced and of the one denouncing. [They will be asked] whether they think that the one denouncing is worthy of credence; or whether, on the other hand, that person is capable of lying, of calumniating and of perjuring himself; and whether these persons know whether there has ever been any case of hatred, grudge or reason for anmity between the one denouncing and the denounced person.

34. If the denunciations are many in number, there is nothing to prevent the same [character] witnesses to be used for all or [to use different] witnesses, always being careful to have a double testimony as to the denounced and any denouncer.

35. If two witnesses cannot be found where each individual knows both the denounced and the denouncer, or if they cannot be interrogated at the same time without the danger of scandal ++14++ or without detriment to the good name concerning him, then arrangements to be made, so that two persons, by means of a divided [dimidiatae] [testimony], namely, interrogate two witnesses only about the denounced and another two only about the individual denouncers. In this case, however, it will be necessary to inquire elsewhere as to whether hatred, enmity or any other

human disaffection against the denunciated [priest] was the case.

36. If not even the divided efforts cannot be pursued, or because capable witnesses cannot be found or because scandal or detriment has to be feared and rightly so, there is the possibility of substituting, cautiously, however, and prudently, [for the witnesses] with extrajudicial information about the denounced and the ones denouncing and their mutual personal relationships, with [all of this] put into writing; or [the same results can come about] also through supportive proofs which corroborate or weaken the accusation.

[p.009] 37. This [article], then, pertains to the third letter (c). If in the denunciations, which happens not rarely, some persons are influenced, perhaps also solicited, or others who can [simply] bring forward testimony concerning for some type of reasona. All of these people must be examined severally (that is, separately) according to the judiciary formula [below.] (Formula I). First of all, they must be interrogated through general matters, and then, by degrees, as the matter evolves, arriving at the particulars, whether and how they had really been solicited, or did they know or hear that other persons had been solicited (Instruction of the Holy Office, February 20, 1867, n. 9).

38. The greatest circumspection must be used in inviting these persons to this interview; for it will not always be opportune to bring them to a public place such as the chancery, especially if these are girls who are being subjected to the examination, married women, or those who are domestics. If those to be examined live either in monasteries, in hospitals or in

pious homes for girls, then, the particular [persons] should be summoned with great diligence and on different days according to circumstances (Instruction of the Holy Office, July 20, 1890).

39. What was said above about the way to receive the denunciations, will also be applied, changing what has to be changed [mutatis mutandis), to the examination of persons who have been brought forward.

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40. [If the examination of these persons, who corroborate each other by positive evidence, and because of which examinations there exists [therefore] either an arraigned priest or another person weighed down [with some accusations], then the denunciations that are true and strictly speaking denunciations and all the rest of the information about these [denunciations] are pursued regarding the qualification of the crime, regarding the resumption of the preceding acts and of the resumption of the efforts to be taken in accordance with what is prescribed above.

41. Once, however, all these matters are taken care of, the Ordinary is to communicate the Acts to the promoter of justice, who will see now whether all the procedures [actions] have been performed corectly or not. And, if he thinks that there is nothing against their acceptance, he should declare the inquisitorial process closed.

Chapter II: Canonical Directives and the Admonition of the Accused.

42. When the inquisitorial process has been closed, the Ordinary, having heard the promoter of justice, should proceed as folows, namely:

a) if it is evident that the denunciation totally lacks a foundation, he should order this to be declared in the Acts, and the documents of the accusation should be destroyed;

b) if the indications of the crime are vague and indeterminate or uncertain, he should order that the Acts be put into the archives, to be taken up again if something else happens in the future;

c) if, however, there are indications of a crime serious enough but not yet sufficient to institute an accusatorial process, as especially in the [p.010] case where only one or two denunciations are had, where, indeed, [the regular process was followed] with diligence but were not corroborated by any or insufficient proofs (cfr. n. 36), or even many [proofs] but with uncertain procedures or procedures that are deficient, he should order that the accused be admonished according to the different [types of] cases (Formula M) the first or second [time?], paternally, seriously or most seriously according to the norm of Canon 2307, adding, if necessary, an exlicit threat of the trial process, should some other new accusation is laid upon [the accused]; the Acts, as above, should be kept in the archives and in meanwhile a check should be kept on the morals of the accused (Canon 1946, § 2, n. 2):

d) If then certain or at last probable arguments to institute the accusation are present, he should order

the accused to be cited and be subjected to the matters [which are prescribed for this trial].

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43. The admonition, concerning which treatment is made in the preceding number with the letter (c), is always to be given secretly; it can be done, however, through a letter or by an intermediary, but in each case, it must be clear from some document to be kept in the secret archives of the Curia (cfr. Canon 2309, § 1 and 5), adding the information about the manner in which the accused accepted it.

44. If, after the first admonition, other accusations against the same accused take place concerning solicitations, preceding the admonition itself, the Ordinary should see, according to his own choice and conscience, whether the first admonition shold be considered sufficient or whether he should proceed to a new admonition or even to further measures (Ibidem, § 6).

45. It is the right of the Promoter of Justice to appeal and to have recrecourse for a accused against the canonical prescriptions of this kind it to the Holy Congregation of the Holy Office within ten ten days from thetheir dissemination or intimation. In this case, the Acts of the case wilhave to be transmitted to the same Holy Congregation according to the preprescription of Canon 1890.

46. These actions, however, even if put into effect, do not extextinguish the penal action, and therefore, when other accusations by chance take place, a method

will be followed concerning those matters which also have given cause to the said canonical instructions.

Chapter III - The decrees for the accused persons

47. When once there is a sufficiency to institute an accusation, as was said above in number 42 (d), arguments should be made openly, and the Ordinary, having heard the promoter of justice and having observed everything, in so far as the peculiar nature of these cases allows, which is stated concerning the citation and denunciation of judicial acts in Book IV, Title VI, Chapter II, of the code, shall issue a decree (Formula O) conerning the accused in the presence of the Ordinary or before a judge delegated by himself (cfr. n. 5), citing [him] for crimes introduced and brought against him, which in the forum of the Holy Office are said in

* * *

[p.015] ++22++

TITLE IV

OFFICIAL COMMUNICATIONS

66. Whenever an Ordinary immediately accepts a denunciation of the crime of solicitation, he should not omit telling this to the HOly Office. And if by chance he treats of a priest whether seculer or religious having residence in another territory, he should transmit at the same time (as already has been stated above, n. 31) to the Ordinary of the place, where the denounced actually is staying, or, if the address is not known, he should send to the Holy Office an authentic

copy of the denunciation itself with the procedures, in the best manner possible, and with opportune information and declarations.

67. Any Ordinary who ahs proceeded correctly against some priest who is soliciting, should not omit informing the Holy Congregation of the Holy Office, and, if it is a matter in which a religious is involved, also the General Superior concerning the outcome of the case.

If any priests condemned of the crime of solicitation, or even only admonished, should transfer his residence to another territory, the Ordinary a quo should immediately warn the Ordinary ad quem of the things that preceded taht person and of his juridical status.

69. If any priest suspended in a case of solicitation from hearing sacramental confessions but not from sacred preaching happens to go to another territory to preach, tho Ordinary of this territory should be reminded by the prelate of the accused, whether secular or religious, that he cannot be utilized for hearing sacramental confessions.

70. All these official communications shall always be made under the secret of the Holy Office; and, since they concern the common good of the church to the greatest degree, the precept of doing these things obliges under serious sin [sub gravi].

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## TITLE V

### THE WORST CRIME

71. By the name of the worst crime is understood at this point a signification of any obscene external deed, gravely sinful, in any perpetrated by a cleric or attempt with a person of his own sex.

72. Those things that have been stated concerning the crime of solicitatior, up to this point are also valid, changing only those things necessary to be changed by their very nature, for the worst crime, if someone by chance in the presence of the Ordinary of the place, concerning which (which may God prevent) happens to be accused, having accepted the obligation of the denunciation from the positive law of the Church, unless [p.016] perhaps it has been joined with the crime of solicitation in sacramental confession. In decreeing penalties, however, against delinquents of this type, besides those which are found spoken of above, and the6y should also be kept before one's eyes (Canon 2359, § 2).

73. To have the worst crime for the penal effects one must do the equivalent of the following: any obscene, external act, gravely sinful, perpetrated in any way by a cleric or attempted by him with youths of either sex or with brute animals (bestiality).

74. Against accused clerics for these crimes, if they are exempt religious, and unless there takes place at the same time the crime of solicitation, even the regular superior can proceed, according to the holy

canons and their proper constitutions, either in an administrative or a judicial manner. However, they must communicate the judicial decision pronounced as well as the administrative decision in the more serious cases to the Supreme Congregation of the Holy Office.

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FROM THE AUDIENCE OF THE HOLY FATHER, MARCH 16, 1962

Our Most Holy Father John XXIII, in an audience granted to the most eminent Cardinal Secretary of the Holy Office on March 16, 1962, deigned to approve and confirm this instruction, ordering upon those to whom it pertains to keep and observe it in the minutest detail.

At Rome, from the Office of the Sacred Congregation, March 16, 1962.

Place of the seal A. Cardinal Ottaviani

[p.017] ++25++

APPENDIX

FORMULAS TO BE USED ACCORDING TO THE CIRCUMSTANCE (Omitting other matters which are found in various places among the authors)

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FORMULA A

## THE FORMULA FOR TAKING AN OATH TO EXERCISE ONE'S OFFICE FAITHFULLY AND TO OBSERVE THE SECRET OF THE HOLY OFFICE

In the name of the Lord.

I . . . appearing before . . . . and touching the most holy Gospels of God placed before me, swear and promise to exercise my duty faithfully. . . . Likewise, under the pain of excommunication late sententiae ipso facto and to be incurred without any declaration, from which outside of the moment of death, I can be absolved by no one except by the Holy Father, excluding even the Cardinal of the Penitentiary, and, under other most serious penalities, at the disposition of the Supreme Pontiff to be inflicted upon me in the csae of transgression, I promise sacredly, vow and swear, to observe inviolably the secret in all matters and details which will take place in exercising the aforesaid duty, excepting precisely those matters at the end and at the completion of this negotiation [or of these negotiations] which can be legitimately published. Further, I shall observe this secret absolutely and in every way with all who have no legitimate part in the treatment of this same matter [or, who are not constricted by the same sworn bond]; nor [will I ever], directly or indirectly, by means of a nod, or of a word, by writing, or in any other way and under whatever type of pretext, even for the most urgent and most serious cause [even] for the purpose of a greater good, commit anything against this fidelity to the secret, unless a particular faculty or

dispensation has been expressly given to me by the Supreme Pontiff.

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FORMULA B

Formula of Renunciation (Abjuration)

I (name, family name, etc. of the one abjuring, which, if he is a religious, he should add his name, etc. which he used in the world) the son of (name of the father), being . . . years of age, and personally brought to trial [arraigned], and, having genuflected before you (name, family name, qualities, etc. of the person who is to receive the abjuration), and having before me and touching with my hand the most holy Gospels and knowing that no one can be saved unless he believes what the Holy Catholic and Apostolic Roman Chruch holds, believes, preaches, professes and teaches, I confess and I am sorry that I have erred seriously against [that church] through the abuse and profanation of the sacrament of penance [and through the profession and doctrine of false dogma].

[Shading is not in the orignal, it has been added to show emphasis in this appendix.]

# APPENDIX G

## CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS

### UNITED STATES CONSTITUTION

**Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VII**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 97. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

**28 U.S.C. § 1602. Findings and declaration of purpose**

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 USCS §§ 1602 et seq.].

**28 U.S.C. § 1603. Definitions**

For purposes of this chapter [28 USCS §§ 1602 et seq.]

(a) A "foreign state", except as used in section 1608 of this title [28 USCS § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

**28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter [28 USCS §§ 1605-1607].

**28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such

property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the

United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607 [28 USCS § 1607], or (D) paragraph (1) of this subsection is otherwise applicable.

(7) [Deleted]

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title [28 USCS § 1608] is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 [46 USCS §§ 31301 et seq.] and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) [Repealed]

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604 [28 USCS § 1604], but for section 1605A [28 USCS § 1605A], the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

**28 U.S.C. § 1606. Extent of liability**

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter [28 USCS § 1605 or 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred

by the persons for whose benefit the action was brought.

**28 U.S.C. § 1608. Service; time to answer; default**

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the

clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

KENTUCKY REVISED STATUTE
TITLE LI Unified Juvenile Code
CHAPTER 620 Dependency, Neglect, and Abuse

KRS § 620.030 (2009)

**620.030. Duty to report dependency, neglect, or abuse -- Husband-wife and professional-client/patient privileges not grounds for refusal to report -- Exceptions -- Penalties.**

(1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Department of Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney or the county attorney; by telephone or otherwise. Any supervisor who receives from an employee a report of suspected dependency, neglect, or abuse shall promptly make a report to the proper authorities for investigation. If the cabinet receives a report of abuse or neglect allegedly committed by a person other than a parent, guardian, or person exercising custodial control or supervision, the cabinet shall refer the matter to the Commonwealth's attorney or the county attorney and the local law enforcement agency or the Department of Kentucky State Police. Nothing in this section shall relieve individuals of their obligations to report.

(2) Any person, including but not limited to a physician, osteopathic physician, nurse, teacher, school personnel, social worker, coroner, medical examiner, child-caring personnel, resident, intern, chiropractor, dentist, optometrist, emergency medical technician,

paramedic, health professional, mental health professional, peace officer, or any organization or agency for any of the above, who knows or has reasonable cause to believe that a child is dependent, neglected, or abused, regardless of whether the person believed to have caused the dependency, neglect, or abuse is a parent, guardian, person exercising custodial control or supervision, or another person, or who has attended such child as a part of his or her professional duties shall, if requested, in addition to the report required in subsection (1) of this section, file with the local law enforcement agency or the Department of Kentucky State Police or the Commonwealth's or county attorney, the cabinet or its designated representative within forty-eight (48) hours of the original report a written report containing:

**(a)** The names and addresses of the child and his or her parents or other persons exercising custodial control or supervision;

**(b)** The child's age;

**(c)** The nature and extent of the child's alleged dependency, neglect, or abuse, including any previous charges of dependency, neglect, or abuse, to this child or his or her siblings;

**(d)** The name and address of the person allegedly responsible for the abuse or neglect; and

**(e)** Any other information that the person making the report believes may be helpful in the furtherance of the purpose of this section.

(3) Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected, or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section. This subsection shall also apply in any criminal proceeding in District or Circuit Court regarding a dependent, neglected, or abused child.

(4) The cabinet upon request shall receive from any agency of the state or any other agency, institution, or facility providing services to the child or his or her family, such cooperation, assistance, and information as will enable the cabinet to fulfill its responsibilities under KRS 620.030, 620.040, and 620.050.

(5) Any person who intentionally violates the provisions of this section shall be guilty of a:

(a) Class B misdemeanor for the first offense;

(b) Class A misdemeanor for the second offense; and

(c) Class D felony for each subsequent offense.

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(3)

No. 08-1384

Supreme Court, U.S.
FILED
JUL 13 2009
OFFICE OF THE CLERK

# In the Supreme Court of the United States

JAMES H. O'BRYAN, DONALD E. POPPE,
and MICHAEL J. TURNER,
*Petitioners,*

v.

HOLY SEE,
*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the Sixth Circuit's decision to apply the Supreme Court's holdings in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) in determining that the Holy See's alleged "official legislative text" was not "commercial activity" under the FSIA.

2. Whether this Court should grant certiorari to review the Sixth Circuit's decision to follow the Supreme Court's holding in *Nelson* and precedent from other circuits in relying upon the essence-of-the-complaint rule to determine which FSIA exception to apply.

3. Whether this Court should grant certiorari to review the Sixth Circuit's decision to follow *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) and its progeny in determining that the FSIA's tort exception requires the tortious act to occur in the United States.

4. Whether this Court should grant certiorari to review the Sixth Circuit's holding that petitioners waived their arguments that extending FSIA protections to the Holy See violates the First Amendment's Establishment Clause, the Seventh Amendment's right to a jury trial, and the Fifth Amendment's right to due process by failing to raise them in the district court.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are identified in the caption above.

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## INTRODUCTION

Petitioners fail to provide any reason that would justify a grant of certiorari review. Petitioners implicitly concede that three of the four issues they raise are not the subject of a conflict amongst the circuit courts, and erroneously claim that a conflict exists as to the fourth – whether a tort must occur in the United States under the FSIA's tort exception. In addition to failing to identify a circuit conflict, petitioners fail to provide any compelling reason justifying this Court's review of issues that are unique to petitioners' allegations.

Review by this Court is also premature. Numerous unadjudicated facial grounds for dismissal remain for consideration by the district court, including the sufficiency of the Complaint under this Court's recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and petitioners' failure to timely file claims under the applicable Kentucky statute of limitations. Moreover, during the pendency of the appeal, petitioners moved in the district court to take the deposition of Pope Benedict XVI. Litigation over petitioners' motion revealed fundamental problems regarding petitioners' central theory that a 1962 Holy See "policy" mandated silence of child abuse complaints in the United States. The Court should not grant review unless and until the record is developed further regarding allegations that have already been undermined in the district court.

Finally, review by the Court is unwarranted because of petitioners' waiver of issues below. Petitioners waived their argument that the first two clauses of the FSIA's commercial activity exception apply and have never provided a basis for application of the third clause. Further, as the Sixth Circuit held,

petitioners waived their constitutional arguments by failing to raise them in the district court.

The Court should deny the petition for writ of certiorari.

## OPINIONS BELOW

The amended opinion of the court of appeals is reported at 556 F.3d 361 and reprinted in Petitioners' Appendix ("Pet. App.") at 1a-46a. The opinion of the district court is reported at 471 F. Supp. 2d 784, Pet. App. 47a-68a.

## JURISDICTION

The judgment of the court of appeals was originally entered on November 24, 2008. Petitioners' petition for rehearing was denied on February 6, 2009. The Holy See's petition for rehearing was granted on February 10, 2009, and an amended opinion of the court of appeals was filed on that date. Petitioners' petition for writ of certiorari was filed on May 7, 2009.

Petitioners invoked this Court's jurisdiction "pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., 28 U.S.C. §§ 1331 and 1332, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367." Petition for Writ of Certiorari ("Cert. Petition") at 1. It appears, however, that petitioners should have properly invoked jurisdiction pursuant to 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

### A. Petitioners' Complaint

Petitioners' Complaint against the Holy See,[1] a foreign sovereign, was filed on June 4, 2004. In their Complaint, petitioners conclusorily allege that they were "sexually abused, molested and assaulted by a Roman Catholic priest" in Kentucky in the "1920s" (O'Bryan), "early 1960s" (Poppe) and "mid 1970s" (Turner). Complaint ¶¶ 16-18, 63-64, 100, Pet. App. 99a-100a, 113a, 126a. The Complaint provides no other information regarding petitioners' individual claims, other than to allege that petitioner Turner had previously brought a legal action based upon the same injuries against a diocese in Kentucky, received compensation for his injuries, and released the diocese from further liability. Complaint ¶¶ 54, 92, Pet. App. 110a, 124a.

Petitioners allege that the basis for their putative class action lawsuit against the Holy See is a 1962 document "first discovered and made public in July, 2003 by news media in the United States and throughout the world." Complaint at 3, Pet. App. 90a. According to petitioners, the 1962 document[2] reveals

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[1] Although the Holy See is known colloquially as the Vatican, Holy See is the correct appellation. *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 282 (S.D. Tex. 2005).

[2] Because the Complaint does not provide the name of the document, the Holy See will refer to it in this brief as "the 1962 document" for the sake of convenience. It is worth noting that although a purported reproduction of this document has been included by petitioners as Appendix F in support of their petition, the document in the appendix had no role in the proceedings

"the cover up" of childhood sexual abuse "mandated by the Holy See[.]" Complaint at 2-3, Pet. App. 88a-89a. Although petitioners baldly assert that the 1962 document "plainly required" bishops in the United States "to violate" child abuse reporting laws, Cert. Petition at 8, petitioners allege no fact linking the 1962 document to their individual claims. Indeed, the Complaint itself never even claims that the 1962 document was received by any diocese in Kentucky, much less that it was applied with regard to any priest who abused petitioners. *See* Complaint ¶ 45, Pet. App. 107a (stating only that the 1962 document was "privately circulated" to unidentified persons); ¶¶ 45-46, Pet. App. 107a-108a (alleging that the 1962 document sets forth "procedural norms" for addressing clergy sexual abuse of minors, yet alleging that there had not been a canonical "investigation or prosecution" of clergy sexual abuse claims in Kentucky for "at least" 60 years). Instead, petitioners' central causation allegation consists of a mere formulaic recitation of Kentucky's legal causation test. Complaint ¶ 48, Pet. App. 108a (alleging that the Holy See's "directives to conceal the sexual abuse of children committed by its clerics, agents, and employees in order to maximize revenue by avoiding scandal was a substantial factor in bringing about each Class Member's abuse"); *see also* Complaint ¶¶ 77, 110, Pet. App. 118a-119a, 131a.

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below. The document was not attached to the Complaint, was submitted to the district court by petitioners only after the hearing on the Holy See's motion to dismiss, was the subject of a timely objection by the Holy See, and was not relied upon by the district court or the court of appeals. Moreover, petitioners have never identified the source of the document; they have, for example, never claimed that it originated from Kentucky.

Petitioners' other allegations are similarly general. Their purported "commercial activity" allegations, for example, are not linked to petitioners' individual claims; rather, they are generalized allegations characterizing the Holy See's relationship with Catholic entities and individuals throughout the world. *See* Complaint ¶ 27, Pet. App. 101a-102a (alleging that the Holy See provides "religious and pastoral guidance, education and counseling services to Roman Catholics worldwide in exchange for revenues derived from its members and other financial contributors"); Complaint ¶ 47, Pet. App. 108a (alleging that the Holy See concealed the sexual abuse of children to "ensure the continued receipt of funds from its parishioners and other financial contributors, all in furtherance of [its] commercial activities").

Finally, petitioners' jurisdictional theory depends upon the imputation to the Holy See of acts of separate corporations – a fact that petitioners omit from their petition. For example, petitioners state that the Holy See "allowed abusive clergy to continue to perform as . . . priests . . . and refused to permit reporting abuse [sic] to civil or criminal authorities[,]" provided "abusive clergy the facilities and opportunity to continue their abusive conduct[,]" and "held abusive clergy out to the community as fit and competent[.]" Cert. Petition at 3-4 (citing Complaint ¶¶ 60-62, Pet. App. 112a-113a). These statements omit key language from the Complaint, namely that the above acts occurred "by and through [the Holy See's] agents[.]" *See* Complaint ¶¶ 60-62, Pet. App. 112a-113a. The only purported "agent" in the United States named in the Complaint – the Roman Catholic Bishop of Louisville, Inc. ("the Louisville Archdiocese") – is acknowledged to be a separate corporation. Complaint ¶ 66, Pet. App. 114a. Petitioners do not allege that the Holy See

exercised any type of day-to-day control over the Louisville Archdiocese or that the Holy See disregarded or abused the corporate form. Petitioners nowhere explain why it is nevertheless appropriate to impute the acts of the Louisville Archdiocese to the Holy See for jurisdictional purposes.

## B. Relevant Proceedings Below

### 1. Motion to Dismiss Litigation

The Holy See filed a facial motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[3] In relevant part, the Holy See's motion challenged the Complaint's assertion of FSIA jurisdiction under the waiver exception, the tort exception and all three clauses of the commercial activity exception. Central to the Holy See's jurisdictional argument was that the relevant allegations in petitioners' Complaint were too conclusory to confer subject matter jurisdiction.

Petitioners' response to the Holy See's motion addressed only the tort exception and the third clause of the commercial activity exception. In addition, petitioners did not argue in the district court that affording the protections of the FSIA to the Holy See was unconstitutional. *Cf.* Cert. Petition at 31-35.

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[3] The district court sequenced defenses to address Rule 12(b)(6) issues after the Holy See's facial subject matter jurisdiction motion had been resolved.

### 2. District Court Order

The district court's order granted in part and denied in part the Holy See's facial motion to dismiss. The district court rejected petitioners' attempt to confer jurisdiction under the commercial activity exception, holding that "petitioners' claims are 'clearly sounding in tort' and [that] their complaint does not allege 'property damage, breach of contract for goods or services, product liability, copyright infringement, an indebtedness yet unpaid on a loan or other transaction, or any other theory whose true essence is commercial.'" Memorandum Opinion, dated Jan. 10, 2007, Pet. App. 53a (quoting *Doe v. Holy See*, 434 F. Supp. 2d 925, 942 (D. Or. 2006)).

Analyzing petitioners' claims under the tort exception, the district court followed this Court's decision in *Amerada Hess* "'that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.'" Pet. App. 56a (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989)). Noting that petitioners "concede that the acts of Defendant itself were all 'committed outside the United States[,]'" the district court held that jurisdiction could not lie under the tort exception for the Holy See's own alleged torts. *Id.* (quoting Pltfs' Resp. to Def. Holy See's Mot. to Dismiss for Lack of Subject Matter Juris., dated July 18, 2006, at 27). The district court stated that "[h]olding otherwise would constitute a dramatic expansion of FSIA." *Id.*

With regard to claims based upon the Holy See's alleged employees in the United States, the district court held that petitioners' allegation that the Holy See exercised "'absolute and unqualified power and control . . . over each and every priest, bishops [sic],

brother, sister, parish, diocese, archdiocese, and instrumentality of the Church'" was sufficient to allege employment status. *Id.* at 58a (quoting Complaint ¶ 20). The district court cautioned, however, that "facts may emerge during the litigation that allow the Holy See to meet its burden [of showing non-employment]" and that the court was "willing to reexamine its ruling on this issue at an appropriate time." *Id.* at 59a.

The district court also held that the scope of employment allegations were sufficient for pleading purposes. The district court determined that if such individuals "acted pursuant to a Holy See policy, these persons were acting within the scope of their employment." *Id.* at 61a. However, the district court noted that "[s]ubsequent evidence may require the Court to revisit these conclusions[.]" *Id.*

### 3. Appellate Briefing

To preserve its immunity from suit, the Holy See appealed the district court's ruling under the collateral order doctrine.[4] On appeal, the Holy See again argued that key allegations in the Complaint were too vague and conclusory to establish subject matter jurisdiction. In particular, the Holy See contended that the Complaint's bald assertion of "absolute and unqualified power and control" by the Holy See over Roman Catholic individuals in the United States was insufficient to show that such individuals were Holy See employees. In addition, the Holy See argued that the mere allegation that the 1962 document was a "substantial factor" in causing petitioners' injuries was insufficient. Finally, the Holy See contended that the

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[4] *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985).

Complaint's allegations failed to meet the substantive jurisdictional requirements of the FSIA's tort and commercial activity exceptions.

Petitioners responded by basing their theory of FSIA jurisdiction on the 1962 document. Asserting that the 1962 document was "central" to their claims, petitioners argued that the Holy See's challenge to the Complaint "virtually ignored . . . allegations concerning the Holy See's policy, reduced to writing in a 1962 document[.]" Pltfs' Fourth Br. on Cross-Appeal at 10; Pltfs' Second Br. on Cross-Appeal ("Pltfs' 2d Br.") at 4. Petitioners cast the 1962 document in definitive terms as "*the* 'Holy See Policy[,]'" *id.* at 7 (emphasis added), and claimed that the 1962 document "requires U.S. bishops to refuse to report clergy child sexual abuse to authorities, even though such failure is a criminal offense in most of the states." *Id.* at 11-12.

The 1962 document played a critical role in petitioners' substantive jurisdictional arguments as well. Petitioners repeatedly urged the court of appeals to use the 1962 document allegations as the basis for finding FSIA jurisdiction on the face of the Complaint under both the commercial activity exception and the tort exception. *See, e.g.*, Pltfs' 2d Br. at 34-35, 36-37, 42-43, 46.

#### 4. Petitioners' Motion to Take the Deposition of Pope Benedict XVI During the Pendency of the Appeal

During the pendency of the appeal, petitioners moved in the district court under Federal Rule of Civil Procedure 27 to take the deposition of Pope Benedict XVI – the first deposition from the Holy See that petitioners requested in this case. Petitioners based

their request for the Pope's deposition largely on their stated need to obtain testimony regarding the 1962 document. In support of their motion, petitioners provided a declaration from canon lawyer Thomas P. Doyle, which attached as an exhibit an unofficial translation of the 1962 document. In his declaration, Doyle stated that "**Pope Benedict XVI is the only living person who knows how the 1962 decree, *Crimen Sollicitationis*, was decreed, disseminated and enforced by his predecessor Popes, and particularly how it was enforced during his term as head of the CDF** [Congregation for the Doctrine of the Faith]." Decl. of Thomas P. Doyle, dated Apr. 7, 2008 ("Doyle Decl.") ¶ 10 (bold in original). Doyle's declaration, however, was silent as to any connection between the 1962 document and petitioners' individual claims.

In opposition to petitioners' motion to take Pope Benedict XVI's deposition, the Holy See argued that the request was barred by, *inter alia*, head of state immunity, the doctrine of inviolability, territorial sovereignty and international comity. The Holy See also opposed the proffered factual basis for petitioners' motion. The Holy See demonstrated that Doyle – petitioners' own canon law expert – had in prior testimony and publications contradicted the 1962 document theories at the heart of petitioners' Complaint. For example, whereas petitioners claim that the 1962 document mandated "secrecy" in order to "ensure the continued receipt of funds from its parishioners" (Complaint ¶¶ 45, 47, Pet. App. 107a-108a), Doyle had previously explained that the 1962 document's confidentiality provisions were "primarily rooted in the fact that [the document] deals with the sacrament of penance to which is attached inviolable secrecy." Thomas P. Doyle, *The 1962 Vatican*

*Document on Solicitation in the Confessional* (Aug. 10, 2003) at 2, attached as Ex. A to the Decl. of Jeffrey S. Lena in Supp. of Def. Holy See's Resp. to Pltfs' Mot. for Leave to Take Depo. to Perpetuate Testimony, dated Aug. 11, 2008 ("Lena Decl."). Doyle had also stated that the confidentiality that "was (and still is) imposed on parties and witnesses in canonical proceedings is intended to assure witnesses that they can speak freely. It is also intended to protect the reputations of the accused and accuser until guilt or innocence is determined." *Id.* These are, of course, some of the goals of the United States grand jury process,[5] a comparison that Doyle himself has repeatedly made. *See, e.g.*, Depo. of Thomas P. Doyle in *The Clergy Cases III*, Alameda County Super. Ct. Coord. Proc. No. 4359, taken on Aug. 26, 2005 ("Doyle Aug. 26, 2005 Depo.") at 95, attached as Ex. E to the Lena Decl. ("It's similar to a grand jury where there's – you know, secrecy is imposed in a grand jury . . . .").

Doyle had also previously rejected petitioners' "cover up" theory. In fact, he stated that those espousing a "cover up" theory based upon the 1962 document "don't know what [they're] talking about" and have "misconstrued the document, misunderstood it." Depo. of Thomas Doyle in *John Doe v. Catholic Archbishop of Seattle*, Spokane County Super. Ct. Case No. 03-2-06469-1, taken on Sep. 23, 2004, at 113, attached as Ex. F. to the Lena Decl. As for petitioners' core claim that the 1962 document mandated non-compliance with state child abuse reporting statutes,

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[5] *See, e.g., Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 567 n.11 (1983) (stating that federal grand jury secrecy encourages "persons to testify fully and freely" and "protects the reputations of the innocent").

Doyle testified that the 1962 document "doesn't say that." Doyle Aug. 26, 2005 Depo. at 94. In fact, Doyle has explained that "[t]he Code of Canon Law is not a substitute for the civil law systems of the various countries where the Church is established. It does not 'trump' civil law." Decl. of Thomas Doyle in *The Clergy Cases I*, L.A. County Super. Ct. Coord. Proc. No. 4286, dated May 30, 2006, at 6, attached as Ex. G to the Lena Decl. According to Doyle, "nothing" in the 1962 document could be interpreted to "prohibit[] a bishop or religious superior from notifying civil authorities of an allegation prior to the initiation of the canonical process." Thomas Doyle, *The 1962 Vatican Instruction* (Nov. 1, 2006) at 9, attached as Ex. I to the Lena Decl. Given that petitioners allege that a canonical process has not occurred in Kentucky in over 60 years (Complaint ¶ 46, Pet. App. 107a-108a), Doyle's testimony contradicted petitioners' theory that the 1962 document's confidentiality provisions caused non-reporting of child abuse by the Louisville Archdiocese.

Finally, the Holy See noted that Doyle had identified no evidence of the 1962 document's use in Kentucky. In fact, although Doyle claimed to have studied documentation from 97% of U.S. dioceses and reviewed "more than 1,500 priest personnel files," Doyle Decl. ¶ 5, Doyle has stated that "no documentary evidence produced by dioceses in civil cases between 1985 and the present contained any reference to this document or any indication that the prescribed norms were ever followed." Thomas Doyle, et al., *Canonical History of Clerical Sexual Abuse: An Overview* 60 (2004), attached as Ex. R to the Lena Decl.; *see also, e.g.*, Decl. of Thomas Doyle in *Melanie H. v. Defendant Doe 1*, Case No. 04 CV 1596 WQH (JFS) (S.D. Cal. Aug. 8, 2005) at 16-17, attached as Ex. S to the Lena Decl. ("there is little if any evidence that the document

was ever referred to in any of the hundreds of civil cases brought against dioceses and religious communities over the past 15 years").

Faced with Doyle's prior statements, petitioners submitted another declaration from Doyle on reply – which notably did not repudiate any of his prior testimony or publications. In connection with their reply, petitioners also still provided no evidence that showed that the 1962 document was ever used in Kentucky, much less in connection with the priests alleged to have abused petitioners. Moreover, petitioners did not explain how the canonical investigative and prosecutorial provisions set forth in the 1962 document could have been applied when no canonical investigation or prosecution ever took place in Louisville. Complaint ¶ 46, Pet. App. 107a-108a.

The district court denied petitioners' motion to take Pope Benedict XVI's deposition on October 21, 2008.

### 5. The Court of Appeals' November 24, 2008 Opinion and the Parties' Petitions for Rehearing

On November 24, 2008, the court of appeals affirmed the district court's order granting in part and denying in part the Holy See's facial motion to dismiss for lack of subject matter jurisdiction.[6] In light of petitioners' repeated descriptions of the 1962 document as "the Holy See Policy" and the "basis" of their claims, the Sixth Circuit found that "all of the

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[6] This section provides a description of the Sixth Circuit's opinion that is limited to petition for rehearing issues. A more complete discussion of the Sixth Circuit's relevant holdings is provided below.

claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See." Opinion, dated November 24, 2008 ("Nov. 24, 2008 Op.") at 12. Just like petitioners' "Statement of Facts" in their opening brief on appeal, the Sixth Circuit's factual discussion quoted the Complaint's key language regarding the 1962 document. *Compare id.* at 2-3 *with* Pltfs' 2d Br. at 7-8. Moreover, as petitioners had urged, the court of appeals relied on the Complaint's 1962 document allegations to resolve substantive jurisdictional issues. *See* Nov. 24, 2008 Op. at 12 (commercial activity exception), 17 (situs), 18-19 (discretionary function exception).

Petitioners filed a petition for panel rehearing.[7] On the heels of the district court litigation wherein the Holy See demonstrated that petitioners' canon law expert had previously disagreed with petitioners' 1962 document theories, petitioners now argued that the court of appeals' conclusions regarding the significance of the 1962 document to petitioners' case were based upon a "misperception[.]" Plaintiffs-Appellees, Cross-Appellants' Pet. for Panel Reh'g, dated Dec. 22, 2008 ("Pltfs' Pet. for Reh'g") at 6. Indeed, petitioners argued that even "to *imply* that all of the claims made by [petitioners] stem from the 1962 policy would be *inaccurate*[.]" Plaintiffs-Appellees, Cross-Appellants' Response to the Holy See's Mot. for Leave to Resp. to Pet. for Panel Reh'g, dated Jan. 6, 2009, at 1 (emphasis added). Petitioners now claimed that they only "mentioned" the 1962 document in the Complaint because it "resulted in the public revelation" of the Holy See's "direct involvement" in the handling of

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[7] In their petition for writ of certiorari, petitioners omitted any mention of the petition for rehearing litigation.

clergy child sexual abuse. Pltfs' Pet. for Reh'g at 7. And in contrast to petitioners' own appellate briefing – which relied extensively on the 1962 document for petitioners' substantive jurisdictional arguments – petitioners now sought to eliminate material references to the 1962 document from the court of appeals' jurisdictional analysis. *Id.* at 8-9.

The Holy See also filed a petition for rehearing. Describing the burden-shifting regimen under the FSIA, the Sixth Circuit had stated in its opinion that a foreign sovereign is required to make a *prima facie* showing "'that the plaintiff's claim relates to a public act of the foreign state – that is, an act not within the exceptions in sections 1605-1607.'" Nov. 24, 2008 Op. at 8 (quoting *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 n.5 (6th Cir. 1988)). Based upon this Court's decision in *Nelson* and precedent from other circuits, the Holy See noted that foreign states do not have a *prima facie* burden of showing that a plaintiff's claims arose out of a "public act" or that the FSIA's exceptions do not apply. Appellant/Cross-Appellee Holy See's Pet. for Reh'g and Reh'g En Banc, dated Dec. 23, 2008.

The court of appeals denied petitioners' petition for rehearing[8] and granted the Holy See's petition for rehearing. The Sixth Circuit filed an amended opinion that deleted the reference to a foreign state's *prima facie* burden of showing a "public act" or the non-

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[8] Petitioners at one point state that "[a]lthough the Sixth Circuit focused on the 1962 mandate, in fact, the Holy See's policies and procedures enforcing silence regarding clergy-child sex abuse existed long before and were simply reissued in 1962." Cert. Petition at 15 n.3. That is, of course, what the court of appeals rejected on rehearing – which petitioners neglect to mention in their petition for certiorari.

applicability of FSIA exceptions. *See* Amended Opinion, dated Feb. 10, 2009, Pet. App. 17a-18a.

### 6. The Court of Appeals' February 10, 2009 Amended Opinion

Relying upon their reading of the Oregon district court's opinion in *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006), petitioners argue that the Sixth Circuit erred in holding that religious activity is not commercial activity. *See* Cert. Petition at 18 ("[T]he Sixth Circuit's conclusion that the Holy See's conduct is sovereign is clearly erroneous. Exempting the Holy See's conduct from the commercial activity exception due to its 'intrinsically religious' nature is not authorized by the express language or purpose of the FSIA, this Court's decision in *Weltover*, and as discussed below, the United States Constitution."); *id.* at 21 ("Under the Sixth Circuit's analysis, the conclusion that the Holy See's conduct was not subject to the commercial activity exception ignores the private, nonsovereign nature of the conduct . . . . Nothing indicates that Congress intended the FSIA to immunize religious conduct as sovereign.").

Petitioners' argument mischaracterizes the Sixth Circuit's opinion. The Sixth Circuit nowhere held that the Holy See's activities do not meet the requirements of the commercial activity exception because they are "intrinsically religious."[9] Instead, the court of appeals found that "all of the claims advanced by plaintiffs stem from the promulgation of the purported 1962 Policy by the Holy See" (Pet. App. 28a) – a "policy" that

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[9] Even the *Doe* district court itself did not reach that conclusion. *Doe*, 434 F. Supp. 2d at 941-42.

petitioners themselves allege was "'an official legislative text, issued by the Congregation of the Holy Office and specifically approved by Pope John XXIII.'" Pet. App. 4a (quoting Complaint ¶ 45). Based upon this Court's holdings in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the court of appeals therefore concluded that petitioners' claims did not stem from private, commercial conduct. Pet. App. 27a-28a.[10]

More significantly, though, the court of appeals agreed with the district court and the *Doe* court that the "essence" of petitioners' claims was not commercial:

> the gravaman of plaintiffs' claims is the tortious conduct of priests which was allegedly facilitated by the tortious conduct of Holy See employees. Thus to allow plaintiffs to obtain jurisdiction under the commercial activity exception through a semantic ploy would allow them to "obtain jurisdiction over a claim that Congress did not intend to be brought against a foreign sovereign." We therefore conclude that the commercial activity exception does not apply.

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[10] The court of appeals' conclusion was well in line with this Court's precedent. *See, e.g., Nelson*, 507 U.S. at 362 (quoting Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 225 (1952)) ("'[S]uch acts as legislation . . . cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such.'").

Pet. App. 28a (quoting *Leutwyler v. Office of Her Majesty Queen Rania Al Abdullah*, 184 F. Supp. 2d 277, 299 (S.D.N.Y. 2001)). The Sixth Circuit's holding that the commercial activity exception did not apply, in other words, turned on the *tortious* nature of petitioners' claims, not their religious nature.

Second, with regard to the situs of the tort, the court of appeals followed this Court's decision in *Amerada Hess*, as well as decisions of the Second Circuit and the D.C. Circuit, to hold that the FSIA's tort exception only permits jurisdiction over torts occurring in the United States. Pet. App. 31a.

Third, the Sixth Circuit held that petitioners had waived their argument that the FSIA could not be constitutionally applied to the Holy See by failing to raise it in the district court. Pet. App. 16a. The court of appeals found no "exceptional circumstances" excusing petitioners' waiver. Pet. App. 16a n.5.

## REASONS FOR DENYING THE WRIT

### I. Certiorari Should Be Denied Because No Conflict Exists Amongst the Circuit Courts as to Any of the Issues Raised

The petition for writ of certiorari raises four issues. Because there is no conflict amongst the circuit courts as to any of the issues, the petition should be denied.

#### A. Petitioners Do Not Claim that a Conflict Exists Amongst the Circuit Courts as to Three of the Four Issues Raised in Their Petition

Petitioners do not claim a conflict amongst the circuit courts as to three of the four issues they raise.

First, petitioners do not claim that there is a conflict regarding the Sixth Circuit's holding that the Holy See's alleged policy regarding sexual abuse is not "commercial activity."[11] Second, petitioners do not argue that there exists a conflict with regard to whether applying the FSIA to the Holy See violates the Constitution.[12]

Third, with regard to their "gravamen" argument, petitioners correctly acknowledge that a "growing number of courts" apply the essence-of-the-complaint rule adopted by the Sixth Circuit. Cert. Petition at 22. The gravamen approach was applied by this Court in *Nelson* and has been used by the Second, Fifth, Seventh and Ninth Circuits. *Nelson*, 507 U.S. at 363; *see also, e.g., Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *De Sanchez v.*

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[11] Throughout their petition, petitioners repeatedly state that part of the inquiry under the commercial activity exception is whether the activity is "public" or "private." *See, e.g.*, Cert. Petition at 12. That is incorrect. Under the plain language of the statute, the inquiry is whether the activity is "commercial." 28 U.S.C. 1605(a)(2); 28 U.S.C. 1603(d); *see also Weltover*, 504 U.S. at 615 ("the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in '*trade and traffic or commerce*[.]'") (emphasis added) (citations omitted); *cf. Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997) ("Requiring a foreign state to prove a public act conflicts with the plain language of the statute: a foreign state is immune from suit unless one of the enumerated exceptions applies. There is no exception for non-public acts.")

[12] Courts have, in fact, long applied the FSIA to the Holy See. *See, e.g., Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009); *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006); *English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987).

*Banco Central de Nicaragua*, 770 F.2d 1385, 1398-99 (5th Cir. 1985); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983). Moreover, all three federal courts to reach the issue have concluded that the gravamen rule precludes application of the commercial activity exception in cases against the Holy See involving sexual abuse claims. *See* Pet. App. 28a (panel decision); Pet. App. 53a (district court opinion); *Doe*, 434 F. Supp. 2d at 942.[13] Petitioners provide no reason why this Court should grant certiorari to review an issue that has been the subject of consensus in FSIA jurisprudence.

### B. Petitioners Erroneously Claim that a Circuit Conflict Exists Regarding Whether the Tort Must Occur in the United States Under the Tort Exception

Petitioners claim that a "conflict exists" with regard to whether a tort must occur in the United States in order to fall within the FSIA's tort exception. Cert. Petition at 27. The claim is incorrect: no circuit conflict exists.

First, the rule applied by the Sixth Circuit is compelled by this Court's decision in *Amerada Hess*, which held that the tort exception "covers only torts occurring within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441. Petitioners' characterization of the language in *Amerada Hess* as *dictum* is erroneous. In the relevant

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[13] *See also English*, 676 F. Supp. at 763 (in case against Holy See alleging clerical sexual abuse, listing FSIA exceptions and holding that "the immunity exception upon which plaintiffs *must* rely is [the tort exception]") (emphasis added).

part of the opinion, the *Amerada Hess* Court rejected an argument that mere injury in the United States – the claimed loss of property resulting from disrupted contractual payments due in New York – could confer jurisdiction under the tort exception. *Id.* The Court did not reject the argument on the basis that the alleged injury was insufficient under the tort exception; instead, the Court rejected the argument because the tort exception required the tort to occur within the United States. *Id.* Since the conclusion regarding the locus of the tort was essential to the decision, the language states a holding, not *dictum*. *See, e.g., Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 200 n.3 (2d Cir. 1999) (stating that the *Amerada Hess* Court "*held* that this exception 'covers only torts occurring within the territorial jurisdiction of the United States'") (emphasis added); *Wolf v. Fed. Republic of Germany*, 95 F.3d 536, 542 (7th Cir. 1996) (same).

The two cases cited by petitioners for the proposition that a conflict exists – *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) and *Olsen v. Gov't of Mexico*, 729 F.2d 641 (9th Cir. 1984) – are both pre-*Amerada Hess* decisions. Moreover, *Letelier* was subsequently rejected by the D.C. Circuit. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-43 (D.C. Cir. 1984); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984); *see also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379-80 (7th Cir. 1985) (stating that the *Letelier* court's interpretation was "rejected by the Court of Appeals for that circuit"). In addition, after *Amerada Hess*, the Ninth Circuit has made statements that call into question whether *Olsen* remains good law. *See, e.g., Sec. Pac. Nat'l Bank v. Derderian*, 872 F.2d 281, 285 n.8 (9th Cir. 1989) (citing *Amerada Hess*, 109 S. Ct. at 688-91) (stating that the

tort exception "requires not only that personal injury or property damages occur in the United States, but that the tortious act or omission occur here"); *see also Doe v. Holy See*, 557 F.3d 1066, 1085 n.11 (9th Cir. 2009) ("we have no occasion to consider whether the entire tort must occur in the United States, as the Sixth and D.C. Circuits have held").

In any event, the weight of authority after *Amerada Hess* is overwhelming: courts agree that the tortious act or omission must occur in the United States to fall within the tort exception, just as the court of appeals held below. *See Cabiri*, 165 F.3d at 200 n.3; *Wolf*, 95 F.3d at 542; *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1065 (5th Cir. 1992); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423, 431 (E.D.N.Y. 2001), *vacated on other grounds by* 332 F.3d 173 (2d Cir. 2003), *cert. granted and vacated*, 542 U.S. 901 (2004), *aff'd* 389 F.3d 61 (2d Cir. 2004); *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1118 (N.D. Ill. 1997); *S. Seafood Co. v. Holt Cargo Sys., Inc.*, No. Civ.A.96-5217, 1997 WL 539763, at *7 (E.D. Pa. Aug. 11, 1997); *Cabiri v. Gov't of Republic of Ghana*, 981 F. Supp. 129, 132 (E.D.N.Y. 1997), *aff'd in part and rev'd on other grounds in* 165 F.3d 193 (2d Cir. 1999); *Hirsh v. State of Israel*, 962 F. Supp. 377, 383-84 (S.D.N.Y. 1997); *Rein v. Rein*, No. 95 Civ. 4030 (SHS), 1996 WL 273993, at *3 (S.D.N.Y. May 23, 1996); *Coleman v. Alcolac, Inc.*, 888 F. Supp. 1388, 1403 (S.D. Tex. 1995); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 313 (E.D.N.Y. 1995); *El-Fadl v. Cent. Bank of Jordan*, No. Civ.A. 93-1895 RMU, 1994 WL 1656111, at *4 (D.D.C. Nov. 9, 1994); *Velasquez v. Gen. Consulate of Mexico*, No. C-92-3745 CFL, 1993 WL 69493, at *3 (N.D. Cal. Mar. 4, 1993); *Intercont'l Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 677 (C.D. Cal. 1993),

*disapproved on other grounds in Sun v. Taiwan*, 201 F.3d 110 (9th Cir. 2000); *Denegri v. Republic of Chile*, Civ. A. No. 86-3085, 1992 WL 91914, at *2 (D.D.C. Apr. 6, 1992); *Antares Aircraft L.P. v. Fed. Republic of Nigeria*, No. 89 Civ. 6513 (JSM), 1991 WL 29287, at *4 (S.D.N.Y. Mar. 1, 1991); *Polanco v. Dominican Republic*, No. 90 Civ. 7089 (WK), 1991 WL 146306, at *2 (S.D.N.Y. July 22, 1991); *Fickling v. Commw. of Australia*, 775 F. Supp. 66, 72 (E.D.N.Y. 1991); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1, 7-8 (D.D.C. 1990); *Goquiolay v. Philippines Nat'l Bank*, No. 90 CIV. 893 (CSH), 1990 WL 144118, at *3 (S.D.N.Y. Sept. 28, 1990); *Bennett v. Stephens*, CIV. A. No. 88-2610 (RCL), 1989 WL 17751, at *4 (D.D.C. Feb. 23, 1989).[14]

There is, in short, no circuit conflict with regard to whether the tort must occur in the United States to satisfy the tort exception's requirements. Because the only conflict identified by petitioners does not exist, the petition should be denied.

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[14] Even before *Amerada Hess*, the consensus was that the tortious act or omission had to occur within the United States. *Frolova* 761 F.2d at 379-80; *Asociacion de Reclamantes*, 735 F.2d at 1524; *Persinger*, 729 F.2d at 842; *Kline v. Kaneko*, 685 F. Supp. 386, 391 (S.D.N.Y. 1988); *Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F. Supp. 1096, 1102 (D. Colo. 1988); *Ledgerwood v. State of Iran*, 617 F. Supp. 311, 314 (D.D.C. 1985); *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1315-16 (D.D.C. 1985); *Evans v. Petroleo*, Civil Action No. H-83-91, 1984 WL 1887, at *1 (S.D. Tex. Aug. 2, 1984); *In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982); *see also* H.R. REP. NO. 1487, at 21 (1976) ("the tortious act or omission must occur within the jurisdiction of the United States"); *English*, 676 F. Supp. at 764 (applying tort exception's situs rule in case against Holy See arising out of sexual abuse claim).

## II. Certiorari Should be Denied Because Petitioners Have Failed to Identify Any Compelling Reason Justifying this Court's Review

In addition to not identifying a circuit conflict, petitioners provide no compelling reason justifying this Court's grant of certiorari. Supreme Court Rule 10. The issues raised by petitioners turn on the Complaint's allegations regarding the 1962 document and on the imputation of acts of the Louisville Archdiocese to the Holy See. The issues are unique to petitioners' Complaint; they are not matters of national importance.[15]

Petitioners urge consideration of the effect that the Sixth Circuit's decision may have on "class members" who have already settled lawsuits and released bishops in the United States, Cert. Petition at 28, but petitioners have not yet moved for, much less obtained, class certification. This is currently an action brought by three individual plaintiffs, not a class, and only the interests of those three individuals are properly before the Court. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 312 n.1 (1976) ("Without such certification [under Rule 23] and identification of the class, the action is

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[15] The Holy See recently filed a petition for a writ of certiorari in the only other pending case against the Holy See involving claims of child sexual abuse. *See Holy See v. Doe*, No. 09-1 (U.S. filed June 25, 2009). There is one plaintiff in *Doe*, and the case does not involve any allegations regarding the 1962 document. Moreover, the issue of national importance raised by the Holy See's petition for a writ of certiorari – whether a foreign sovereign can be stripped of immunity based upon a vicarious liability rule that is contrary to the FSIA's jurisdictional requirements – is not at issue in the instant case.

not properly a class action."); *Cruz v. Farquharson*, 252 F.3d 530, 534 (1st Cir. 2001) ("Only when a class is certified does the class acquire a legal status independent of the interest asserted by the named plaintiffs . . . ."); *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("Because a class has not been certified, the only interests at stake are those of the named plaintiffs.").

Given that the issues raised by petitioners are not of general significance, certiorari should be denied.

## III. Certiorari Should be Denied Because There Remain Numerous Unadjudicated Facial Grounds for Dismissal

Certiorari is not appropriate given that petitioners' Complaint is subject to numerous unadjudicated facial grounds for dismissal.

The district court and the court of appeals held that petitioners' jurisdictional allegations were sufficient under the FSIA's tort exception to withstand a facial Rule 12(b)(1) challenge. However, in light of this Court's intervening decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the sufficiency of petitioners' Complaint for purposes of subject matter jurisdiction is once again an open question. For example, the district court and the appellate court accepted as true petitioners' allegation that the Holy See exerts "absolute and unqualified power and control . . . over each and every priest, bishop, brother, sister, parish, diocese, archdiocese, and instrumentality of the Church" in the United States to find that petitioners had sufficiently alleged employment under the FSIA's tort exception. Complaint ¶ 20, Pet. App. 100a. The lower courts also deemed sufficient petitioners' bare assertion that the 1962 document was a "substantial

factor" in causing petitioners' injuries. Complaint ¶ 48, Pet. App. 108a. Given this Court's recent holding in *Iqbal* that conclusory allegations should not be taken as true, 129 S. Ct. at 1950, the law of the case regarding the sufficiency of petitioners' pleading is now unsettled. *See, e.g., Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that court of appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent). The issue will need to be resolved by the lower court in the first instance. *See, e.g., Hunter v. Hydrick*, 129 S. Ct. 2431 (2009), *remanding for further consideration in light of Iqbal* 500 F.3d 978 (9th Cir. 2007).

Second, the Holy See intends to challenge the sufficiency of petitioners' Complaint under Rule 12(b)(6).[16] As with a renewed facial 12(b)(1) challenge, a challenge under Rule 12(b)(6) will address the sufficiency of petitioners' Complaint in light of *Iqbal* – including whether petitioners' bare assertions of injury by the Holy See's "policy," and that diocesan bishops in the United States are Holy See "employees," are sufficient. The Holy See also intends to raise, *inter alia*, statute of limitations and release defenses in a Rule 12(b)(6) motion. All three petitioners waited decades after their injuries before filing suit against the Holy See, and Kentucky appellate courts have barred child abuse suits under statute of limitations provisions in similar circumstances. *See, e.g., Moyers v. Roman Catholic Bishop of Louisville*, No. 2004-CA-001886-MR, 2005 WL 3116116, at *5 (Ky. App. Nov. 23, 2005). In addition, petitioner Turner

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[16] As noted above, Rule 12(b)(6) issues were preserved until the Holy See's facial subject matter jurisdiction challenge was resolved.

released the Holy See's putative "employee" – the Louisville Archbishop – in 2004; under Kentucky law, that release should operate in favor of the Holy See. *See, e.g.*, *Waddle v. Galen of Ky., Inc.*, 131 S.W.3d 361, 366 (Ky. App. 2004); *see also* Cert. Petition at 28.

Given the upcoming potentially-dispositive litigation, there is no reason for this Court to review the court of appeals' decision now. The Holy See brought an immediate appeal of the district court's decision in order to preserve its immunity from suit; as this Court has recognized in the immunity context, such appeals are appropriate under the collateral order doctrine. *Iqbal*, 129 S. Ct. at 1945-46. Petitioners, on the other hand, can appeal any adverse rulings once final judgment is entered. At that stage, petitioners can argue that review by this Court is appropriate; for now, however, any such argument is premature.

## IV. Certiorari Should Be Denied Because Petitioners' Claims Regarding Both the 1962 Document and the Imputation of Acts of Separate Corporations to the Holy See are Not Ripe for this Court's Review

Even assuming that the Complaint can survive a subsequent purely legal challenge, recent developments have revealed that petitioners' case has other significant jurisdictional problems.

The litigation during the pendency of the appeal – which was initiated when petitioners moved to take Pope Benedict XVI's deposition – demonstrated fundamental problems in petitioners' 1962 document theories. Notwithstanding the extraordinary nature of petitioners' request, petitioners were unable to produce evidence linking their injuries to any Holy See action,

including the 1962 document. In fact, petitioners' own expert had previously rejected all of petitioners' central contentions regarding the 1962 document, including (a) that the 1962 document's confidentiality provisions were intended to "ensure the continued receipt of funds" from parishioners, (b) that the document is evidence of a worldwide "cover up" by the Holy See and (c) that the 1962 document "mandated" non-compliance with state child abuse reporting statutes. *See supra* pp. 10-12.

This Court should not grant certiorari under these circumstances. Before reaching the issue of whether the 1962 document could constitute "commercial conduct" for purposes of FSIA jurisdiction, the Court should afford the court below the opportunity to determine whether petitioners can even meet their burden of producing evidence of a link between the 1962 document and their claims. *See* Pet. App. 17a-18a (panel decision) (stating that petitioners have the burden of producing evidence showing that an FSIA exception applies). After all, if petitioners cannot sustain their claims regarding the 1962 document, the first three questions petitioners raise in their petition would be hypothetical. *See, e.g., Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (certiorari improvidently granted where constitutional question "may be entirely hypothetical").

Even if petitioners were able to surmount all of the problems identified above, this case would still require further development with regard to whether the acts alleged by petitioners are even attributable to the Holy See. For purposes of pleading, the district court and the Sixth Circuit accepted petitioners' bare allegation that bishops and other clerics in the United States were Holy See employees. However, the district court noted that "facts may emerge during the litigation that

allow the Holy See to meet its burden [of showing non-employment]" and that the court was "willing to reexamine its ruling on this issue at an appropriate time." Pet. App. 59a.[17] As the Ninth Circuit recently held, acts by dioceses in the United States are not attributable to the Holy See absent day-to-day control or an *alter ego* relationship. *See Doe*, 557 F.3d at 1080 (rejecting FSIA jurisdictional theory based on allegations that "the actions of the domestic corporations are attributable to the Holy See"); *see also, e.g., First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). This Court should not resolve whether the activities alleged by petitioners – such as providing educational or counseling "services" – satisfy the commercial activity exception until petitioners meet their burden of producing evidence that there is an agency or *alter ego* relationship upon which to attribute the alleged acts.

In short, this case is not ripe for the Court's review.

## V. Certiorari Should Be Denied Because Petitioners Waived Their Arguments that the First Two Clauses of the FSIA's Commercial Activity Exception Apply and Have Not Provided Any Basis for Application of the Third Clause

Petitioners waived their argument that jurisdiction lies under the first two clauses of the commercial

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[17] Of course, under the Sixth Circuit's amended opinion and the FSIA's burden-shifting regimen, petitioners are the ones who will have the burden of production as to the employment issue. Pet. App. 17a-18a.

activity exception. While petitioners' Complaint alleges jurisdiction under all three clauses (Complaint ¶ 2, Pet. App. 92a; Pet. App. 53a (district court opinion)), petitioners did not contest the Holy See's arguments in the district court that neither of the first two clauses applied. Further, petitioners nowhere asserted in their district court briefing that jurisdiction could lie under the first two clauses. Petitioners' failure to raise these arguments in the lower court resulted in waiver. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised . . . in the lower court.").

Petitioners have also never provided any basis for application of the commercial activity exception's third clause. Given that the alleged educational and counseling "programs" – the supposed "commercial activity" – occurred in the United States, it is unclear what commercial activity "elsewhere" petitioners claim satisfies the third clause. *See* 28 U.S.C. 1605(a)(2) ("in connection with a commercial activity of the foreign state *elsewhere*") (emphasis added); *see also, e.g.*, H.R. REP. No. 94-1487, at 19 (stating that third clause embraces "commercial conduct abroad having a direct effect in the United States"). Moreover, petitioners cannot satisfy the third clause's requirement that an act of the Holy See "cause[d] a direct effect in the United States[.]" 28 U.S.C. 1605(a)(2). An effect is direct "only if it follows as an immediate consequence of the defendant's . . . activity." *Weltover*, 504 U.S. 607, 618 (1992). Petitioners have provided no basis to find that their alleged injuries – resulting from intervening decisions by unidentified actors over a broad span of time – were "immediate consequence[s]" of any Holy See "policy."

Because petitioners' commercial activity arguments either have been waived or lack merit, certiorari should be denied.

## VI. Certiorari Should Be Denied With Respect to the Constitutional Issues Because Petitioners Have Waived Them

Petitioners' cursory briefing of constitutional issues omits that the court of appeals held that petitioners' constitutional arguments had been waived for failure to raise them in the district court. *See* Pet. App. 16a (holding that "plaintiffs waived their constitutional challenges to the FSIA"); *cf.* Cert. Petition at 31-35.[18]

"This Court . . . is one of final review, not of first view." *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (quotations and citations omitted); *see also, e.g., United States v. Oakland Cannabis Buyers Co op.*, 532 U.S. 483, 494 (2001) ("Because the Court of Appeals did not address these claims, we decline to do so in the first instance."). Because petitioners' constitutional arguments were waived and not reached by the court of appeals, the Court should decline to grant certiorari.

## CONCLUSION

The petition for writ of certiorari should be denied.

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[18] It is worth noting that the United States government intervened in the court of appeals and took the position that the FSIA was not unconstitutional as applied to the Holy See.

Respectfully submitted,

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July 2009

(2)

Supreme Court, U.S.
FILED
JUL 21 2009
OFFICE OF THE CLERK

No. 08-1384

In The
# Supreme Court of the United States

JAMES H. O'BRYAN, DONALD E. POPPE, and MICHAEL J. TURNER,

*Petitioners*,

v.

HOLY SEE,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITIONERS' REPLY BRIEF

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## I. Ashcroft v. Iqbal Did Not Announce a New Standard of Review, Nor Does It Warrant A Renewed Facial Attack

The Holy See claims that after this Court's decision in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), "the law of the case regarding the sufficiency of petitioners' pleading is now unsettled." Brief in Opposition, p. 26. However, the rule stated in Iqbal, relied upon by the Holy See, that "conclusory allegations" will not suffice is not new. Iqbal cited the case of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007), for this proposition, wherein the Court stated, "the longstanding conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." This rule has been applied by the circuit courts for many years, including the Sixth Circuit. Thus, the same rule was applied by the Sixth Circuit in O'Bryan v. Holy See, 556 F.3d 361, 376 (6th Cir. 2009), which in its review of the Petitioners' Complaint applied the rule that "'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" (Quoting Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005)). Viewed under this standard, both the Sixth Circuit and the Kentucky district court found that the allegations in the Complaint were not conclusory and were sufficient to establish jurisdiction over the Holy See's employees and officials. For a summary of the allegations regarding the Holy See's control over its employees and officials in the United States, see Petition for Writ of Certiorari, pp. 2-8. Plaintiffs' Complaint specifically identifies the source of the Holy See's authority over its employees and officials as well as the execution of that authority in the United States. The Holy See's "facial" attack on

these allegations is squarely before the Court. No new attack premised upon Iqbal is warranted.

The challenge the Holy See intends to make in the future regarding its statute of limitations defense weighs in favor, not against, a review by this Court at the present stage. The application of the Kentucky statute of limitations to those answerable for failing to report priest sex abuse is a fact-intensive inquiry. Roman Catholic Diocese of Covington v. Secter, 966 S.W.2d 286 (Ky. App. 1998), is the controlling case in Kentucky. In Secter, the plaintiff was assaulted seventeen years before the complaint was filed against the Diocese. The plaintiff did not learn until within a year of filing the complaint that the Diocese had been receiving reports of abuse and yet had taken no action to discipline or sanction the abuser, to inform other students, parents, or employees, or to report the incidents to state authorities. Secter, 966 S.W.2d at 290. Instead, the "information was kept secret and confidential in the Canon 489 file."[1] Id. The Kentucky court concluded that the Diocese's conduct implicated KRS 413.190(2), a Kentucky statute pursuant to which the limitations period may be tolled where the defendant conceals himself or obstructs the prosecution of the action. Id. The court also ruled that "where the law imposes a duty of disclosure, a failure of disclosure may constitute concealment under KRS 413.190(2), or at least amount to misleading or obstructive conduct." Id. (Quoting Munday v. Mayfair

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[1] Canon 489 of the Code of Canon Law requires a separate archive for the safeguarding of confidential information. Secter, 966 S.W.2d at 287-288. In Secter, secret Canon 489 files contained prior reports of sexual abuse and the bishop's recorded concerns about the abuser's pedophilia.

Diagnostic Lab., 831 S.W.2d 912, 915 (Ky. 1992)). Thus, it is clear that there will be a great deal of discovery regarding what was known to the Holy See and its employees and officials regarding sexual assaults by its clergy and what the Holy See and its employees and officials did with that information. The scope of the discovery that will be permitted will be dependent upon the lower court's jurisdiction. It is important to answer the jurisdictional question first, prior to discovery commencing in the case. Indeed, this was the very purpose of the Holy See's interlocutory appeal.

## II. The Factual Support for Plaintiffs' Allegations that the Holy See Has a Longstanding Official Policy of Concealing Priest Sexual Abuse Have Been Strengthened in the Interim Period Pending Appeal

Since this appeal was taken, the systemic world-wide problem of concealing pedophiles and permitting children to be victimized by sexual predators in Catholic institutions was exposed in a well-publicized report by the Irish government, available online at http://www.childabusecommission.ie/rpt/pdfs/. In 2000, Ireland established "The Commission to Inquire into Child Abuse" to investigate child abuse in Irish institutions. The report, published May 20, 2009, focused on schools operated by the Catholic Church, and found beyond a doubt that church officials consistently shielded their orders' pedophiles from arrest amid a culture of secrecy. Conclusion No. 20 of the Executive Summary of the Report states:

**Cases of sexual abuse were managed with a view to minimising the risk of public disclosure and consequent damage to the institution and the Congregation. This policy resulted in the protection of the perpetrator. When lay people were discovered to have sexually abused, they were generally reported to the Gardai. When a member of a Congregation was found to be abusing, it was dealt with internally and was not reported to the Gardai.**

The damage to the children affected and the danger to others were disregarded. The difference in treatment of lay and religious abusers points to an awareness on the part of Congregational authorities of the seriousness of the offence, yet there was a reluctance to confront religious who offended in this way. The desire to protect the reputation of the Congregation and institution was paramount. Congregations asserted that knowledge of sexual abuse was not available in society at the time and that it was seen as a moral failing on the part of the Brother or priest. This assertion, however, ignores the fact that sexual abuse of children was a criminal offence.

Executive Summary, pages 21-22 (full text available at http://www.childabusecommission.com/rpt/pdfs/CICA-Executive%20Summary.pdf). The Commission's Report covered the time period from 1936 to the present, with most complaints between 1936 and 1970. Id., page 2.

The findings of the Irish government are consistent with the allegations in Plaintiffs' Complaint, that the 1962 document is "a reflection and written manifestation of the *longstanding* policies and directives of the Holy See regarding clergy sexual abuse.... The policies of the Holy See expressed *in this and other documents* require bishops in the United States to, among other things, refuse to report childhood sexual abuse committed by priests to criminal and civil authorities, even where such failure to report would itself be a criminal offense." Pet. App. E, p. 90a; J.A. 13 (emphasis added).

The Holy See in its opposition focuses upon the 1962 document and seeks to undermine its significance. Brief in Opposition, p. 28. The key significance of the 1962 document to Plaintiffs' allegations is the fact of its publication in July, 2003, that resulted in the public revelation of the Holy See's direct involvement in the handling of accusations of child sexual abuse by Roman Catholic priests, including the longstanding mandate of secrecy. Prior to the release of the 1962 document into the public domain in July, 2003, the Holy See's hand in prohibiting the disclosure of clergy-child sex abuse was not known. Its disclosure constituted the very first notice to anyone outside the church hierarchy that the Holy See was directly responsible for enforcing a code of silence regarding clergy child sex abuse. However, the Plaintiffs' allegation that the Holy See enforced a policy of silence does not rest or fall on the interpretation of the 1962 document. That document, also referred to as *Crimen sollicitationis* ("*Crimen*"), is merely a written embodiment of a policy that predates it by over a century.

Attached at App. 1 to this Reply is the full text of the Declaration of Thomas P. Doyle, O.P., K.C.D., C.A.D.C., dated October 9, 2008, which was submitted to the district court in support of Plaintiffs' request to take discovery of Pope Benedict XVI, the former Cardinal Ratzinger, who is now 82 years old, and who, as Cardinal, was head of the Holy See's Congregation for the Doctrine of Faith ("CDF"), which handles issues of clergy sexual abuse. The Holy See in its Brief in Opposition attacks Fr. Doyle as having made contradictory statements regarding the impact of the 1962 document. As Fr. Doyle makes clear, the 1962 document is one expression of the "Church's world-wide policy of secrecy that has been in place since at least 1866." Doyle Declaration, ¶ 5. The Holy See's policy of enforced silence did not begin with *Crimen sollicitationis*. *Crimen* was preceded by an essentially identical document issued on June 9, 1922, by the Supreme Sacred Congregation of the Holy Office (predecessor to the CDF). Id. ¶¶ 6-8. Like the 1962 document, the 1922 document was issued in strict secrecy and its content was never published in the official publication of the Holy See, the *Acta Apostolicae Sedis*. Id. However, both documents were sent to diocesan bishops. Id. ¶ 7.

The Holy See argues that *Crimen* is inconsequential based upon Fr. Doyle's opinion, previously expressed in other cases, that *Crimen* was not the result of a "conspiracy" or "cover up." In fact, the provocation for and nature of *Crimen* and its predecessor documents are much more important in the context of this case than evidence of a "conspiracy". They reflect the overarching Holy See policy of enforced secrecy in cases of child sex abuse. As stated by Fr. Doyle:

> [T]he 1962 document and its predecessor from 1922 are not proof of an explicit world-wide conspiracy to cover up clergy sex crimes. This is because it is more accurate to assess both documents as indications of *an official policy of secrecy* rather than a *conspiracy of cover up*. The policy of extreme confidentiality is deeply rooted in the ecclesial culture. The 1922 and 1962 documents did not create this culture. They arose out of it and gave legal force to the pattern of secrecy. Nor are they the only expression of the policy of secrecy. The secrecy surrounding child sexual abuse within the Catholic Church was a result of the policies of the Catholic Church, both written and unwritten, that have existed for centuries.

Id., ¶ 8 (emphasis in original).

The Holy See's "institutionalized concern for secrecy" goes hand in hand with the traditional canonical concept known as the "privilege of the forum" or "*privilegium fori*" which is a traditional privilege claimed by the institutional church whereby clerics (which includes deacons, priests and bishops, archbishops and cardinals) accused of crimes were tried before ecclesiastical courts and not brought before civil or secular courts. Id. ¶ 9. The fact that the procedural norms for intra-church secret prosecution of abusive priests were rarely utilized simply confirms Plaintiffs' claims. It does not contradict them. As alleged in Plaintiffs' Complaint, abusive priests were moved from church to church, district to district, and never prosecuted. Pet. App. E, pp. 105a-106a, 126a, ¶¶ 42, 99; J.A. 25-26, 43.

The fact that ecclesiastic prosecutions of abusive priests rarely occurred has been acknowledged by the church itself. For example, on August 29, 2003, the Diocese of Covington, Kentucky, publicly admitted to a vast record of child abuse by its priests and scant prosecution. In "A Report On The History of Sexual Abuse Of Minors In The Diocese of Covington," the Bishop of Covington issued "50 Year Report" outlining the extensive history of abuse of minors by Covington's priests.[2] As reported by the Bishop, "Over the past 50 years, there is reasonable cause to believe that 30 out of 372 diocesan priests [nearly 10%] have sexually abused one or more minors." "In the 1950's and 1960's sexual misconduct was perceived as a spiritual matter, a sin for confession with a penance to be performed with sincere contrition and a firm purpose of amendment. There was always the goal of forgiveness and redemption. The priest was sent for treatment at a residential facility or required to attend psychological counseling. Oftentimes, the recommendation from the mental health professionals was that the problem had been satisfactorily addressed and that the priest could safely be returned to ministry with appropriate monitoring and psychological and spiritual support." The fact that the canonical procedures were not followed is indicative of the severity of the problem created by the Holy See's mandated policy of silence. Not only were priests not being reported for civil prosecution, they were not being prosecuted within the church.

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[2] The full text of the Report is available online at http://www.covingtondiocese.org/index.cfm/NewsItemID=86685&From=Home.

The Holy See in its brief seems to suggest that it is entitled to conduct ecclesiastical "grand jury" proceedings in secret to protect the reputations of its clergy accused of child sexual abuse. Brief in Opposition, p. 11, fn. 5. However, Kentucky law does not, nor should it, permit the canonical "grand jury" process were allegations of child sexual abuse are kept secret. Certainly, the history of pervasive abuse within the Catholic Church has taught the fallacy of this approach.

## III. Plaintiffs Did Not Waive Their Commercial Activity Arguments

Plaintiffs' Complaint and arguments below sufficiently framed the commercial activities of the Holy See both inside and outside of the United States and did not waive application of all three prongs of the commercial activity exception. The district court understood that Plaintiffs were asserting all three prongs. O'Bryan v. Holy See, 471 F.Supp.2d 784, 788 (W.D. Ky. 2007), J.A. 85 ("the plaintiff in the Doe case sought liability against the Holy See under only the first and third clauses of the commercial activity exception; *Plaintiff here seeks liability via all three clauses*" (emphasis added)). See also Plaintiffs' Response to Motion to Dismiss, p. 23, J.A. 237 (Arguing that the Holy See's commercial activities included directing "'its bishops *in the United States* to conceal from its parishioners and the general public the sexual abuse of children.'" (Quoting Complaint, ¶ 47, J.A. 27-28 (emphasis added)). The Sixth Circuit likewise found Plaintiffs had not waived their argument that all three prongs of the commercial activity exception applied to the conduct at issue.

## IV. This Court Should Consider the Constitutional Implications of the Application of the FSIA to the Holy See

The Sixth Circuit did find Plaintiffs had waived their constitutional arguments by not raising them before the district court. O'Bryan v. Holy See, 556 F.3d 361, 375 (6th Cir. 2009). Plaintiffs encouraged the Sixth Circuit to consider the constitutional implications of the application of the FSIA to the Holy See's conduct in this case, and similarly encourage this Court not to disregard the important constitutional implications at issue here. There has been extensive briefing by all sides in this case and any determinations on the merits have been limited to the legal sufficiency of the allegations in the Plaintiffs' Complaint. Where no issue on the merits remains to be resolved and the issues involve issues of law, it is appropriate for the Court to address the constitutional challenges on appeal even if not raised below. Turner v. City of Memphis, Tenn., 369 U.S. 350, 353 (1962). Indeed, it is axiomatic that this Court should not take unconstitutional actions.

## V. The Holy See's "Corporate Form" Arguments Are A Red Herring

The Holy See engages in an irrelevant analysis of corporate principles to distinguish itself from the Louisville Archdiocese, which is mentioned in passing in the Plaintiffs Complaint. Pet. App. E, pp. 113a-114a, ¶ 66; J.A. 32-33. This is not a case in which Plaintiffs have sued a "separate juridical entity" as an instrumentality of a foreign sovereign under 28 U.S.C. § 1603(a). See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, (1983). In

such case, a plaintiff demonstrates that the instrumentality is the agent or alter ego of the foreign state by alleging the means and methods by which the state exercises day-to-day control over the agency. Id. at 176-179. The Holy See's argument that Plaintiffs' allegations must be "analyzed in terms of the actions of the Louisville Corporation" was rejected by the Sixth Circuit, which noted that Plaintiffs repeatedly pled that the acts of which they complain were "committed by priests, clerics, bishops, archbishops, cardinals, agents and employees." O'Bryan, 556 F.3d at 383, fn. 9.

The remainder of the opposition's arguments do not appear to raise new issues and therefore Plaintiffs will address these arguments in their brief on the merits, if so permitted.

## CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Petitioners pray that the Court grant a writ of certiorari in this matter.

Respectfully Submitted,

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# APPENDIX

## APPENDIX 1

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

**CIVIL ACTION NO. 3:04CV-338-H**

**[Filed October 10, 2008]**

**ELECTRONICALLY FILED**

JAMES H. O'BRYAN, DONALD E. POPPE and MICHAEL J. TURNER, Individually and on Behalf of All Similarly Situated Victims of Childhood Sexual Abuse Committed by Roman Catholic Priests, Clerics or Agents of the Roman Catholic Church

PLAINTIFFS

vs.

HOLY SEE, in its Capacity as a Foreign State (State of the Vatican City), and in its Capacity as an Unincorporated Association and Head of an International Religious Organization

DEFENDANT

## DECLARATION OF THOMAS P. DOYLE, O.P., J.C.D., C.A.D.C.

1. I, Thomas Patrick Doyle, declare under penalty of perjury as provided for by the laws of the United States (28 U.S.C. §1746), that the following statements are true and correct:

2. The purpose of my original declaration (April 7, 2008) was to explain to the court that Cardinal Ratzinger, now Pope Benedict XVI, has extensive and unique factual knowledge regarding the extent of sexual abuse by Catholic clerics (which includes deacons, priests and bishops, archbishops and cardinals) in the U.S., and further that Pope Benedict has unique and extensive information on the extent of similar knowledge by former popes, especially Pope John Paul II.

3. Pope Benedict's knowledge, in both instances, is not based upon the existence of *Crimen sollicitationis*. Pope Benedict's knowledge, as clearly set forth in my original Declaration, is based upon his position as Prefect of the Congregation for the Doctrine of Faith, from 1981 to 2005, and his current position as Pope.

4. Rather, as set forth in my Declaration, **one of the matters** Pope Benedict would have extensive knowledge about is the 1962 Decree *Crimen sollicitationis*, a document expressing the Catholic Church's world-wide policy to maintain in absolute secrecy all canonical processes instituted as a result of reports of sexual abuse by priests and clerics.

5. As further set out herein, the *Crimen sollicitationis* is a document that:

a) Substantiates that the highest ranking officials of the Catholic Church have been aware for centuries of the wide spread problem of sexual abuse by its priests and clerics.

b) Is evidence of the Church's world-wide policy of secrecy that has been in place since at least 1866.

6. *Crimen sollicitationis* is essentially a set of procedural norms for processing cases of accusations against priests for soliciting sex while in the act of sacramental confession. Solicitation is an especially heinous canonical crime and one which results in severe penalties for those found guilty. This document on solicitation was preceded by one issued on June 9, 1922 by the Supreme Sacred Congregation of the Holy Office. It was signed by the prefect, Cardinal Merry del Val, and was approved by Pope Pius XI. Like the 1962 document, it was issued in strict secrecy and its content was never published in the official publication of the IIoly See, the *Acta Apostolicae Sedis*.

7. The 1922 and 1962 documents are identical in content. The 1962 document however contains an appendix which provides the formularies to be used for the various steps in the judicial process. Both documents were sent to diocesan bishops. The 1962 document was intended for use in cases involving diocesan priests as well as priests who were members of religious communities.

8. I have previously testified that the 1962 document and its predecessor from 1922 are not proof of an explicit world-wide conspiracy to cover up clergy

sex crimes. This is because it is more accurate to assess both documents as indications of *an official policy of secrecy* rather than a *conspiracy of cover up*. The policy of extreme confidentiality is deeply rooted in the ecclesial culture. The 1922 and 1962 documents did not create this culture. They arose out of it and gave legal force to the pattern of secrecy. Nor are they the only expression of the policy of secrecy. The secrecy surrounding child sexual abuse within the Catholic Church was a result of the policies of the Catholic Church, both written and unwritten, that have existed for centuries.

9. To fully understand the institutionalized concern for secrecy within the Catholic Church one must also understand the traditional canonical concept known as the "privilege of the forum" or "*privilegium fori*" which has its roots in early medieval Canon Law. Basically this is a traditional privilege claimed by the institutional church whereby clerics (which includes deacons, priests and bishops, archbishops and cardinals) accused of crimes were tried before ecclesiastical courts and not brought before civil or secular courts. The '*privilegium fori*" was included in the 1917 Code of Canon Law:

1. *Clerics in all cases, whether contentious or criminal, shall be brought before an ecclesiastical judge, unless it has been legitimately provided otherwise in certain places.*
2. *Cardinals, Legates of the Apostolic See, Bishops, even titular ones, Abbots, Prelates Nullius, Supreme Superiors of Religious Institutes of Pontifical Right, and major officials of the Roman Curia may not be*

> *summoned before lay judges for matters pertaining to their duties without referring first to the Holy See; the same is true for others enjoying the privilege of the forum, where the Ordinary of the place [diocesan bishop] where the matter is to be tried is to be approached. The Ordinary, however, especially when a lay person is the petitioner, will not deny this permission except for just and grave reasons, all the more so when he is unable to bring about a resolution of the controversy between the parties.* (Canon 119)

10. The canon that mentions the "privilege of the forum" was not repeated in the revised Code of 1983. However, the belief and practice among the institutional church that clerics not be subjected to the civil law, has been active at least since the 11th century. To put this matter in perspective, it is important to remember that the organization of the Catholic Church is modeled after a pre-medieval monarchy, which is hierarchical by design and monarchical in practice. The church is an absolute monarchy and the will of the monarch, the Pope, is to be followed by all its members.

11. Clergy sexual abuse issues are handled by the Congregation for the Doctrine of the Faith, a major department of the Vatican administration. This has been the case since the 16th century although the name of the present congregation has been changed twice during this period. It was first known as the Supreme Sacred Congregation of the Roman and Universal Inquisition (1542-1908). At the beginning of the 20th century, Pope Pius X changed the name to the Supreme Sacred Congregation of the Holy Office. After

Vatican Council II, the name was again changed to the Sacred Congregation for the Doctrine of the Faith (1965) and with the promulgation of the revised Code of Canon Law in 1983, the word "Sacred" was dropped. Cardinal Ratzinger, presently Pope Benedict XIV, had been the Prefect, or head, since 1981. Although he signed the letter containing the revised norms and quite possibly had a direct role in drafting it, the procedures themselves had to be approved or promulgated by the Pope for validity and effect. Cardinal Ratzinger became Pope Benedict XVI in 2005 and appointed William Cardinal Levada to succeed him as Prefect.

12. Under ordinary circumstances *Crimen Sollicitationis* would have ceased to have legal force with the promulgation of the 1983 Code of Canon Law. This was not the case however, and the words of the subsequent document, commonly known as *De delictis gravioribus*, signed by Cardinal Ratzinger, clarify this issue:

> *At approximately the same time the Congregation for the Faith, through an ad hoc Commission established, devoted itself to a diligent study of the canons on delicts, both of the Code of Canon Law and the Code of Canons of the Eastern Churches, in order to determine "more grave delicts both against morals and in the celebration of the sacraments" and in order to make special procedural norms "to declare or impose canonical sanctions," because* ***the Instruction Crimen sollicitationis, issued by the Supreme Sacred Congregation of the Holy Office on March 16, 1962, in force***

***until now**, was to be reviewed when the new canonical Codes were promulgated.*

13. Expressions of the belief and practice among the institutional church that clerics not be subjected to the civil law has been seen in recent civil cases of clergy sexual abuse. Several Vatican officials including Julian Cardinal Herranz, Tarcisio Cardinal Bertone and Fr. Gianfranco Ghirlando, S.J., have issued public statements to the effect that bishops should not be obliged to cooperate with secular legal authorities in cases involving sexual abuse by clerics. Cardinal Herranz, at the time President of the Pontifical Council for the Interpretation of Legislative texts, said:

*While recognizing the competence of civil authorities, Herranz expressed strong reservations about the application to the Catholic church of two hallmarks of American civil law -- an obligation to report misconduct and monetary damages for institutional negligence.*

*"Given the emotional wave of public clamor," Herranz said, "some envision an obligation on the part of ecclesiastical authority to denounce to civil judges all the cases that come to their attention, as well an obligation to communicate to judges all the documentation from ecclesiastical archives."*

*Herranz rejected the idea.*

*"The rapport of trust and the secrecy of the office inherent to the relationship between the bishop and his priest collaborators, and between priests*

*and the faithful, must be respected," he said.* (John Allen, May 17, 2002, National Catholic Reporter)

14. In a February 2002 interview with the Italian journal 30 Giorni, Cardinal Bertone, who was secretary of the Congregation for the Doctrine of the Faith at the time and later became papal secretary of State said:

*"In my opinion, the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of pedophilia is unfounded," Bertone said. "Naturally civil society has the obligation to defend its citizens. But it must also respect the 'professional secrecy' of priests, as it respects the professional secrecy of other categories, a respect that cannot be reduced simply to the inviolable seal of the confessional.* (John Allen, May 30, 2002, National Catholic Reporter)

15. Fr. Gianfranco Ghirlanda, S.J., is dean of the faculty of Canon Law at the Gregorian University in Rome. In an interview in 2002, he spoke about a number of aspects related to clergy sex abuse including the involvement of the secular courts:

*Jesuit Fr. Gianfranco Ghirlanda, dean of the canon law faculty at Rome's Gregorian University and a judge for the Apostolic Signatura, considered the Vatican's supreme court, addressed the issue in the May 18 issue of La Civilta Cattolica. The journal is considered quasi-official since it is reviewed by the*

*Vatican's Secretariat of State prior to publication.*

*"Certainly it does not seem pastoral behavior when a bishop or religious superior who has received a complaint informs the legal authorities of the fact in order to avoid being implicated in a civil process that the victim could undertake," Ghirlanda wrote.* (Ibid., John Allen)

16. Cardinal Ratzinger, now Pope Benedict XVI, as Prefect of the CDF from 1981-2005 was in the position at the Vatican that was most involved in enforcing these policies, and is the most knowledgeable person in the world regarding how these policies were interpreted and enforced.

17. There are nine major departments within the Vatican bureaucracy, called Congregations. In addition there is the Secretariate of State, the tribunals, Pontifical Commissions, Pontifical Councils and offices. All major decisions emanating from the Congregations are personally approved by the Pope, who generally meets with the Prefect (head) on a regular, and sometimes, weekly basis. Therefore, Cardinal Ratzinger, now Pope XVI, would also be in the best position to know what was known by Pope John Paul II.

18. *Crimen Sollicitationis* remained in effect until 2001 when the Vatican published a new set of procedures for investigating and prosecuting especially grave canonical crimes, including certain sexual crimes committed by the clergy. Two official documents were issued. The first was an apostolic

letter of Pope John Paul II, known by its Latin title *Sacramentorum sanctitatis tutela*, by which the actual norms were promulgated. This letter, dated April 30, 2001, was followed on May 18, 2001 by an official document that contained the actual norms. This latter document was signed by Cardinal Josef Ratzinger, prefect of the Congregation for the Doctrine of the Faith. Both documents refer to certain serious canonical crimes and among those is sexual abuse by clerics. These documents represent revised procedures to be used by Bishops and major religious superiors in response to allegations of clergy sexual abuse.

19. Though some have claimed that *Crimen Sollicitationis* applies only to solicitation in the confessional, and not to other sexual crimes perpetrated by clerics, the opposite is true. The very words of the document itself clearly establish that those acts included under the classification of "the worst crime" (*de crimine pessimo*) are to be processed according to the norms set forth for the crime of solicitation. Title V of the document, "*De crimine pessimo*," includes the crimes of sexual contact with same sex partners, sexual contacts with minors and bestiality. These crimes are also to be processed according to these special norms. The document does not imply that these crimes were to have been perpetrated through solicitation in the confessional. It included them under the title "The worst crimes" and presumably because of their serious nature, they were included under these special procedural norms. The 1922 document has an identical section. The norms of both documents were thus established as the obligatory procedures for prosecuting cases of four separate and distinct canonical crimes, namely, a) solicitation for sex in the act of sacramental

confession, b) homosexual sex, c) sexual abuse of minor males or females, d) bestiality or sex with animals. It is therefore incorrect to state that the norms and procedures of *Crimen Sollicitationis* are applicable only to cases of solicitation for sex in the confessional.

20. These four types of sexual crimes were already included in the Code of Canon Law (1917 version). Solicitation is covered in canon 2368, par. 1 and sexual contact with minors and bestiality in canon 2359, 2. Ordinarily the prosecution of these crimes would be processed according to the procedural laws of the Code. The 1922 and 1962 documents provided special norms with an added emphasis on confidentiality because of the very serious nature of the crimes involved. These special procedural norms were an expansion, with added detail, upon the procedural law of the Code.

21. The applicability of *Crimen* to crimes other than solicitation in the confessional is an issue that was taken up by Msgr. Brian Ferme, J.C.D., in his article entitled "*Graviora delicta: the apostolic letter M.P. Sacramentorum sanctitatis tutela*" which appeared in the book Il processo penale canonico (Rome: Lateran University Press, 2003):

> *While the instruction dealt specifically with solicitation and the procedural norms to be applied in judging this crime, the fifth chapter stated that the same norms were also to be observed for the "crimen pessimum" (art. 71), which was understood to include paedolphilia (art. 73). In other words at the promulgation of the CIC83 [Code of Canon Law, 1983] the "graviora delicta" reserved to the CDF seemed to be those concerned with solicitation, the*

*violation of the seal of confession and the "criminum pessimum" as understood by the 1962 Norms, though the actual praxis of the Congregation may have included others.*

22. Regarding the application of *Crimen* in the Archdiocese of Louisville, although I have not personally seen any written evidence that the procedures outlined in the *Crimen* were used in a prosecution in the archdiocese of Louisville, such lack of known written evidence cannot lead to the conclusion that the archbishop was not obliged to follow its norms, nor that these norms were never communicated to the archdiocese. *Crimen sollicitationis* is known as an "Instruction," and was sent to every bishop in the world; yet detailed awareness of its contents has been limited to bishops, and other church officials with a need to know. Unlike most official legal documents issued by the Holy See, this document as well as its 1922 predecessor were not included in any of the collections, official or private. Although some unofficial sources have claimed that the 1962 document was only sent to bishops upon request, there is no reason to believe such an assertion. The fact that a copy of the document may not be found in diocesan archives or a bishop's personal files does not constitute proof that it was not sent to all bishops.

23. The existence of *Crimen sollicitationis* has been authenticated by several sources including sworn testimony of one bishop and one cardinal as well as two professors of Canon Law.

24. Although *Crimen sollicitationis* was published with orders that it remain confidential, this did not

prohibit it from being studied after its promulgation. Francis Cardinal George, Archbishop of Chicago, testified in 2008 that the document was known to him as a seminarian and that it was studied as part of a course on moral theology:

> *Q. Did you know that the Office of the Holy See through the Congregation of the Doctrine of the Faith had implemented a protocol and an instruction to all the superiors across the world regarding solicitation in the confessional?*
>
> *A. What was the year of that protocol please?*
>
> *Q. The year the protocol was issued was '62.*
>
> *A. Oh. Okay. Then yes.*
>
> *Q. My question goes to 2002 and did you know that such a protocol had been issued and disseminated by the Office of the Holy See to the superiors?*
>
> *A. Yes. I was a seminarian in 1962 and in moral theology class that was the document that was given us when we discussed the sacrament of penance.* (Deposition in Doe et al vs. Archdiocese of Chicago, Jan. 30, 2008, p. 24-25)

25. Bishop Joseph Madera, retired bishop of Fresno, also testified in a deposition (Coordinated proceeding, Clergy Cases III, March 1, 2006) that when he was a pastor in Los Angeles in 1962, the archbishop called a special meeting of the priests to discuss the document:

*Q. Have you ever seen any protocols issued by the Vatican at any time while serving as a priest or as a bishop that deals with crimes of solicitation in the confessional and protocols dealing with it?*

*A. I was familiar that we had to take action. I was informed.*

*Q. By the Vatican?*

*A. Yes.*

*Q. How were you so informed?*

*A. I was in Oxnard...And the Bishop of Los Angeles used to call us to meetings and explain to us what kind of important issues had been published.*

*Q. Did you understand that when it came to crimes of solicitation in the confessional, if such an accusation was to be made or was made, it was to be kept secret under those protocols?*

*A. No. I had a very clear idea what I was supposed to do in those cases.*

*Q. What were you supposed to do?*

*A. Report it to Rome immediately.* (P. 156, 157)

*Q. Bishop Madera, you had mentioned that in connection with our discussion about the protocols from the Vatican and the solicitation in the confessional, that there was some kind of meeting with the archbishop where these protocols were discussed. When was that?*

*A. With the Archbishop of Los Angeles?*

*Q. Yes*

*A. Probably in the early sixties. Probably.*

*Q. Was that then Archbishop Manning?*

*A. Yes.* (P. 159. 160)

26. Pope Benedict XVI is the supreme executive, judge and legislator of the Catholic Church and the Holy See. According to Canon Law the pope is not subject to ecclesiastical law (cf. canon 1404). He can change the law or waive the law for himself. Therefore, the Pope is not bound by the limitations of *Regolamento Generale della Curia Romana* (Mar. 20, 1968), *Regolamento Generale della Curia Romana* (Apr. 30, 1999) and *Instructio Secreta continere*, Feb. 4, 1974. The Pope is actually not a member of the Roman or Vatican Curia. Rather, the Curia and all of its departments exist to assist the Pope in his various duties of pastoral and administrative governance.

27. Regarding my qualification as an expert, I am familiar with the bureaucracy of the Catholic Church by reason of my training as a priest. However, I developed in-depth knowledge of the Vatican and its organization, including the details of the history, organization, and responsibility of the CDF, by reason of my training as a canon lawyer. Further, I was assigned to the Vatican Embassy in the U.S. as the Staff Canon Lawyer from 1981 through 1986. In that role, I worked on a regular basis with the Papal Nuncio–The Vatican's ambassador to the U.S. During that time, I became even more intimately familiar with

the responsibilities of the various "Congregations" or departments of the Vatican including the CDF. I first became directly involved with sexual abuse of children by Catholic clerics when, in 1984 I was asked to monitor the development of a case of sexual abuse by a priest sent to the Vatican Embassy by the Bishop of Lafayette Louisiana. Beginning with that case and since, I have done extensive research and writing on the historical and contemporary response of the institutional Catholic Church to the sexual abuse of children. My original declaration and this supplemental declaration are based on the knowledge and information I obtained in all of those roles.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on Oct. 9, 2008, 2008.

/s/ Thomas P. Doyle
Thomas P. Doyle, J.C.D., C.A.D.C.